DOCUMENT RESUME

ED 127 760 EC 090 991

TITLE	Programs and Activities Receiving or Benefiting from Federal Financial Assistance: Nondiscrimination on the Basis of Handicap. Part II, DHEW, Office of the Secretary.
PUB DATE	Jul 76
NOTE	23p.
JOURNAL CIT	Federal Register; v41 n138 p29548-67 July 16 1976
EDRS PRICE	MF-$0.83 HC-$1.67 Plus Postage.
DESCRIPTORS	*Civil Liberties; *Discriminatory Attitudes (Social); Educational Programs; Employment; Equal Education; Exceptional Child Education; *Federal Aid; *Federal Legislation; Government Publications; Grants; *Handicapped Children; Health Services; Legal Responsibility; Nondiscriminatory Education; Social Services
IDENTIFIERS	*Federal Regulations; Rehabilitation Act 1973; Rehabilitation Act Amendments 1974

ABSTRACT

Reported are the rules which the Office for Civil Rights of the Department of Health, Education, and Welfare proposes with regard to nondiscrimination on the basis of handicap in programs and activities receiving or benefiting from federal financial assistance. The proposed rules in Part 84, which effectuates section 504 of the Rehabilitation Act of 1973 as amended by section 111 (a) of the Rehabilitation Act Amendments of 1974, are divided into six major subparts. Subparts A (General Provisions), B (Employment Practices), and C (Program Accessibility) apply to all programs benefiting from federal financial assistance; while the remaining subparts contain more specific requirements and prohibitions applicable to three major types of programs: preschool, elementary, and adult education programs (Subpart D); postsecondary education programs (Subpart E); and health and social service programs (Subpart F). Explained is the fact that the practices of other recipients of funds are subject to the general nondiscrimination provisions. A discussion of the public response to the issues is included, with particular attention given to the comments on the inclusion of mentally restored persons and rehabilitated addicts as beneficiaries of the regulation. (IM)

****
* Documents acquired by ERIC include many informal unpublished *
* materials not available from other sources. ERIC makes every effort *
* to obtain the best copy available. Nevertheless, items of marginal *
* reproducibility are often encountered and this affects the quality *
* of the microfiche and hardcopy reproductions ERIC makes available *
* via the ERIC Document Reproduction Service (EDRS). EDRS is not *
* responsible for the quality of the original document. Reproductions *
* supplied by EDRS are the best that can be made from the original. *
****

ED127760

ABSTRACTED-CEC ERIC

FRIDAY, JULY 16, 1976

U S DEPARTMENT OF HEALTH
EDUCATION & WELFARE
NATIONAL INSTITUTE OF
EDUCATION

THIS DOCUMENT HAS BEEN REPRODUCED EXACTLY AS RECEIVED FROM THE PERSON OR ORGANIZATION ORIGINATING IT. POINTS OF VIEW OR OPINIONS STATED DO NOT NECESSARILY REPRESENT OFFICIAL NATIONAL INSTITUTE OF EDUCATION POSITION OR POLICY

federal register

PART II:

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office of the Secretary

■

PROGRAMS AND ACTIVITIES RECEIVING OR BENEFITING FROM FEDERAL FINANCIAL ASSISTANCE

Nondiscrimination on the Basis of Handicap

EC 090991

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office of the Secretary

[45 CFR Part 84]

PROGRAMS AND ACTIVITIES RECEIVING OR BENEFITING FROM FEDERAL FINANCIAL ASSISTANCE

Nondiscrimination on the Basis of Handicap

The Office for Civil Rights of the Department of Health, Education, and Welfare proposes to add Part 84 to the Departmental regulation to effectuate section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), as amended by section 111(a) of the Rehabilitation Act Amendments of 1974 (29 U.S.C. 706), with regard to Federal financial assistance administered by this Department. Section 504 provides that "no otherwise qualified handicapped individual in the United States * * * shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Section 504 is similar to title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) and title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.). It differs, however, from both these civil rights statutes in that it applies to discrimination based on handicap, from title IX in that it applies to all programs and activities receiving Federal financial assistance, and from title VI in the extent to which it applies to employment practices.

On May 17, 1976, the Department published in the FEDERAL REGISTER, at 41 F.R. 20296, a Notice of Intent to Issue Proposed Rules. The notice raised fifteen critical issues on which the Department sought public comment before publishing a formal Notice of Proposed Rulemaking. A draft Notice of Proposed Rulemaking was attached at Appendix A, and a statement of the estimated economic and inflationary impact of the draft proposal, prepared in accordance with the requirements of Executive Order 11821, was attached at Appendix B.

The May 17 publication was issued to fulfill the Department's responsibility under section 504 of the Rehabilitation Act of 1973 to ensure that programs and activities funded by the Department of Health, Education, and Welfare are free of discrimination on the basis of handicap. The responsibility of the Department, under Executive Order 11914, issued in April 1976, to coordinate governmentwide enforcement of section 504 and to issue general standards for other departments and agencies to follow in their promulgation of regulations implementing section 504, will be dealt with separately at a later time. The Department does, however, expect to use the definition of handicapped person adopted in its final regulation in fulfilling its responsibility to develop governmentwide standards for determining what persons are covered by the Act. Comment is solicited on the advisability of this approach and on the use of Subparts A, B, and C of the final regulation as the basis for developing guidelines as to what practices are discriminatory.

The Department solicited public comment for 30 days on the fifteen issues raised in the notice and on any additional issues that members of the public considered important to the proper enforcement of section 504. Written comments received through June 21, 1976 have been analyzed and considered in the preparation of this Notice of Proposed Rulemaking. Comments received after that date will be considered during the comment period applicable to this notice.

During the 30-day comment period on the Notice of Intent to issue Proposed Rules, the Office for Civil Rights held ten meetings across the country designed to inform interested persons and organizations of the May 17 publication and to elicit their comments and recomendations concerning the implementation of section 504. Transcripts were made of these meetings and were analyzed along with the written comments in order to enable the Department to benefit as fully as possible from the views of the public on the various issues under consideration. These transcripts are available along with written public comments received by the Department, for public inspection in Room 3231, 330 Independence Avenue SW., Washington, D.C. 20201.

Over three hundred written comments were received in response to the notice. The Secretary is extremely pleased at the extent and quality of the response, particularly in view of the short period of time available for the preparation of comments. He is gratified at the public interest and concern expressed by this response and feels that the comments have more than adequately served the purpose of publication of the notice of intent: to focus public attention and comment on the general issues basic to implementation of the statute and to involve the public in the regulatory process at an earlier and therefore more helpful stage of that process than would otherwise have occurred.

A discussion of the public response to the issues raised in the May 17, 1976, publication as well as a discussion of selected sections in each of the subparts of the proposed regulation is set forth in the following paragraphs.

Subparts A (General Provisions), B (Employment Practices), and C (Program Accessibility) of this proposed regulation apply to all recipients of assistance from the Department of Health, Education, and Welfare. Because handicaps differ widely in nature and in degree of severity, discrimination against handicapped persons includes a wide range of practices with varying effect in different service areas. Therefore, the remaining subparts of the proposed regulation contain more specific requirements and prohibitions applicable to three major types of programs: Subpart D is concerned with preschool, elementary, and adult education programs; Subpart E, with postsecondary education programs; and Subpart F, with health and social service programs. The practices of other recipients of Departmental funds, such as public broadcasters, are subject to the general nondiscrimination provisions of § 84.4 as well as to the provisions of Subpart B and C.

This proposed regulation contains no provisions concerning the Department's procedures for administering the statute because the Department intends to publish a consolidated procedural regulation that will apply to all of the civil rights statutes for which the Department has enforcement responsibilities. Sanctions for noncompliance and enforcement procedures will be the same for section 504, title IX, and title VI. The proposed procedural regulation, which was published on June 4, 1975, at 40 F.R. 24148, and which would have applied to the enforcement of section 504, has been withdrawn. On May 3, 1976, the Department published, at 41 F.R. 18394, a notice of intent to issue a new proposed procedural regulation in order to seek public comment on a number of critical questions concerning the manner in which the Office for Civil Rights enforces various civil rights laws and authorities, including section 504. After the public comments have been evaluated, a new proposed consolidated procedural regulation will be issued.

If the new procedural regulation is not in effect when the regulation implementing section 504 is published in final form, the procedural provisions of the title VI regulation, which may be found at 45 CFR Part 80, will be incorporated by reference into the section 504 regulation for use during the interim.

SUBPART AS ISSUES FROM NOTICE OF INTENT

Three issues were raised in the May 17 Notice of Intent concerning the general provisions of Subpart A. The first issue was how best to interpret the statutory definition of handicapped persons. A great many comments were received concerning whether drug and alcohol addicts or homosexuals should receive the protection of section 504. The draft regulation attached at Appendix A to the Notice of Intent included drug and alcohol addiction, along with other illnessees, as a handicapping condition but excluded homosexuality. The overwhelming majority of comments on this issue urged that homosexuality and addiction be excluded. Others suggested confining the inclusion of alcohol and drug addiction to persons with histories of these conditions. There was also a sizable number of comments that objected to the inclusion of mental illness. Many other commenters did not discuss specific conditions, but expressed the view that the statutory language or its interpretation in the draft regulation was unreasonably broad; some of these commenters suggested limiting the definition to permament conditions or illness.

Commenters made a number of arguments against including alcohol and drug addicts and homosexuals: That these conditions are self-inflicted; that

section 504 is not the proper vehicle for eliminating discriminations based on these characteristics; that the term "handicapped person" does not, from either an historical or popular viewpoint, connote addicts and homosexuals; that such persons, and in particular homosexual persons, would not agree with the notion that they are handicapped; and that inclusion of these groups would detract from the emphasis upon eliminating discrimination against those persons traditionally thought of as being handicapped. Many commenters associated with educational programs also feared that inclusion of addicts would cause serious disruptions of their educational programs.

The Department's suggestion that homosexuals might be included within section 504 by virtue of the statutory inclusion of persons who are regarded as having an impairment was not considered persuasive by any of the commenters. (It should also be noted that none of the commenters referred to homosexuals as being mentally ill.) The Department therefore will continue to interpret the statute so as to exclude homosexuals.

Comments tended to respond to the question of the inclusion of drug and alcohol addicts and of homosexuals in a similar fashion. Because both medical and legal opinion define addiction as an illness and because there has been extensive congressional debate and consideration of this issue with respect to various programs administered by this Department, it is the view of the Department that addiction is clearly within the statutory definition. Further, because of the Rehabilitation Act of 1973 itself, the Department believes that it has no flexibility within the statutory definition to limit the term "handicapped person" to only those individuals who have those severe, permanent, or progressive conditions which are most commonly regarded as handicaps. Accordingly, no change has been made from the May 17 draft regulation in the section defining handicapped person in this proposed regulation. It is however, important to note that the Department intends to give particular attention in its enforcement of section 504 to eliminating discrimination on the basis of the severe handicaps that were the focus of concern in the Rehabilitation Act of 1973.

The implications of the limitations of the coverage of section 504 to handicapped persons who are qualified, contained in the statute and throughout the regulation, should be noted in connection with the inclusion of addicts, as well as of persons who are mentally ill, within the protection of section 504. The fact that these persons are included does not mean that their condition is not to be considered in determining whether they must be provided services or employment opportunities. With respect to the employment of addicts or mentally ill persons, if it can be shown that the addiction or mental illness prevents successful performance of the job, the person need not be provided the employment opportunity in question. If, of course, the condition is not job related, then it may not be the basis for denial of such opportunity. Accordingly, as to the inclusion of these groups of persons within the definition, it is expected that mentally restored persons and rehabilitated addicts will be the primary beneficiaries of the employment provisions of the regulation.

With respect to services, there is considerable evidence of practices that discriminate on the basis of alcohol and drug addiction, especially in regard to the admission practices of hospitals. These latter practices have been specifically prohibited in section 407 of the Drug Abuse Office and Treatment Act of 1972 (21 U.S.C. 1174) and section 321 of the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 (42 U.S.C. 4581); these statutory provisions are also administered by the Department's Office for Civil Rights. With respect to other services, the implications of this coverage are twofold: First, no person may be excluded from the services solely by reason of the presence or history of these conditions; second, to the extent that the manifestations of the condition prevent the person from meeting the basic eligibility requirements of the program or cause substantial interference with the performance of other participants in the program, the condition may be taken into consideration. Thus, a college may not refuse to admit a mentally ill person who can successfully participate in the education program unless the person's behavior is shown to impede the performance of other students.

The Department solicits comment as to how to handle the problem of determining when use of drugs or alcohol has reached the stage of addiction, thus becoming an illness that substantially limits functions, and as to what techniques have been developed by elementary and secondary schools to enable addicted students to continue in school.

The second issue raised in the May 17 notice concerned the degree of specificity that is best suited to this regulation. A few comments favored a general, brief regulation either because that approach would encourage creative methods of compliance, would reduce the technicalities of compliance, or would decrease Federal involvement in the conduct of affected programs. Most of the comments, however, approved of the degree of specificity of the regulation as drafted. The most commonly stated reason was that the guidance provided by detailed regulations is necessary to apprise beneficiaries of their rights and to inform recipients of their responsibilities under section 504. It was also noted that detailed regulations serve to prevent unnecessary and lengthy disputes between recipients and beneficiaries, disputes that would otherwise have to be resolved by the Department or the courts. Given the complexity of the matters being regulated and the lack of a legislative record in most areas, the Department agrees that it is preferable to be as detailed as possible in establishing standards of what practices constitute discrimination at the outset of its enforcement program and therefore has not changed the proposed regulation in this respect.

The third issue raised in the notice of intent concerned whether any time periods for compliance should be adopted in the final regulation. Many comments treated this issue and the issue raised in connection with Subparts D and E as to the difficulty or cost of complying as different aspects of the same problem: Whether the requirements of the regulation should reflect the fact that elimination of discrimination on the basis of handicap will, in many instances, be costly and cannot be achieved immediately. The discussion of these comments, as well as others only indirectly addressing these three issues, follows.

A number of commenters were disturbed by the reference in the May 17 notice to the need, in developing the regulation to implement section 504, to "balance competing equities." As their comments point out, the prohibition of discrimination in the statutory provisions of section 504 is absolute and contains no exception designed to take into account any resulting burden to recipients of Federal assistance. These same commenters also noted the judicially enunciated principle that, in the constitutional context, lack of resources cannot be used to justify a denial of basic rights and that, in particular, cost may not be taken into consideration with respect to the right of handicapped children to a suitable education. Thus, the consideration of cost or other difficulty of compliance or the use of transition periods within the regulation itself was viewed as completely inappropriate by these commenters.

Many of these commenters found the suggestion of allowing compliance to be postponed beyond the time of the publication of a final regulation particularly troublesome in light of the time that has elapsed between enactment of section 504 and publication of the Notice of Intent.

On the other hand, comments from recipients, especially from most of the colleges and universities, voiced the concern that they would be unable to bear the additional financial burden that they foresee as a result of the requirements of the regulation. Few of these commenters disagreed with the Department's interpretation of what practices constitute discrimination. Many, however, suggested that Federal funds should be provided to aid in meeting the statutory requirements, that more time be allowed to make their programs accessible, and that they be relieved of any individual responsibility to reach compliance.

The Department has considered these various points of view and has concluded that, in general, the resolution of this problem arrived at in the draft regulation attached to the May 17 notice is appropriate. Thus, except for §§ 84.12

and 84.22, the proposed regulation does not take into account the cost or difficulty of eliminating discrimination in establishing the standards for what practices constitute discriminations, nor does it, with the exception of the time periods allowed for achieving program accessibility and for providing nondiscriminatory nonacademic services in Subpart D, provide time allowances. The Department agrees in principle with the concept that cost or difficulty are appropriate considerations, not in determining what constitutes discrimination, but in fashioning a remedy if a recipient has been found to be discriminating. It is believed, however, that in the area of architectural barriers the inability to make all existing buildings accessible immediately is so universal and the remedial process so inherently time consuming as to necessitate the use of the flexible standard of program accessibility and to grant time for meeting that standard in the regulation itself. With respect to use of a transition period for elementary and secondary education services, the consensus of commenters was that such a period could not be justified under the terms of the statute. A few commenters were, however, troubled by the potential for inconsistency with Public Law 94–142, which allows such a period. Further comments is therefore solicited on this subject.

As to the suggestion that recipients be relieved of individual (as distinguished from collective) compliance responsibilities, the Department considers that approach to be inimical to the underlying intent of the statute. Cooperative programs or consortia are, of course, encouraged in order to enhance the compliance efforts of individual recipients and the services provided by each to handicapped persons.

Another general issue upon which considerable comment was received derived from the statement in the Notice of Intent that "handicapped persons may require different treatment in order to be afforded access to federally assisted programs and activities, and identical treatment may, in fact, constitute discrimination." The commenters felt strongly that this concept had been overemphasized throughout the regulation. This overemphasis was found objectionable both in principle and in practice: in principle, because it serves to perpetuate the view of handicapped persons as "different," and in practice, because it was viewed as resulting in unnecessary reliance in the draft regulation on the use of separate services to meet the requirements of the statute. In response to these comments, the regulation has been rewritten in several sections so as to shift its emphasis in this regard. The intent of the regulatioins remains the same, however: To ensure that handicapped persons may participate in and benefit from the same services offered to nonhandicapped persons and that, where necessary and possible, adjustments are made in the provisions of regular services, and that separate services be used only where clearly essential.

SUBPART A: DISCUSSION OF SPECIFIC SECTIONS

Under § 84.2, the proposed regulation is applicable to all recipients of financial assistance from the Department of Health, Education, and Welfare and to each program or activity which receives or benefits from such assistance. The Secretary recognizes that recipients of Department funds vary considerably in size, complexity, and resources and that some of the requirements of this part may appear to exceed the resources of very small recipients. The basic requirements of Part 84, however, apply to every recipient. In addition, section 504 of the Rehabilitation Act of 1973 provides no exemption from its general prohibition against discrimination on the basis of the amount of Federal funds received.

In addition to the comments received concerning the three issues on Subpart A in the May 17 notice, the Department received many comments on specific sections in Subpart A. The definition of recipient at paragraph (f) of § 84.3 was the subject of considerable comment. This definition differed from the definition of recipient in the Department's title VI regulation in that it excluded providers of health services whose sole source of Federal support is title XIX of the Social Security Act (Medicaid). The Department had intended by this approach to invest in the state Medicaid agencies the primary responsibility for compliance with section 504 for those providers of services whose sole source of Federal funds was Medicaid.

The response to this approach was decidedly negative and reflected considerable confusion as to whether and in what manner section 504 applied to these providers. In response to the adverse comment and in order to clarify the Department's position that the obligations of section 504 apply to such providers of health services, § 84.3(f) has been changed by the deletion of the sentence which excluded these providers from the scope of the term "recipient." The effect of this change is that, in most states, such providers are themselves directly responsible for complying with the obligations of section 504. In some states, however, individual Medicaid providers will not be recipients of Federal financial assistance because the state Medicaid agency reimburses vendors through health insuring organizations by means of contracts of insurance. In any event, all providers are encompassed within the State's obligation to ensure that it distribute Federal funds in a nondiscriminatory manner and, therefore, such providers must carry out their federally assisted activities in a nondiscriminatory manner.

This change in § 84.3(f) has led to modifications in the sections concerning designation of a responsible employee and adoption of grievance procedures (§ 84.8), and dissemination of policy (§ 84.9) and the addition of standards for accessibility in Subpart F (§§ 84.52 (a)(2) and 84.53(b)). The obligation to comply with §§ 84.8 and 84.9 has now been limited to recipients with 15 or more employees because these compliance requirements are appropriate to large institutions but not to small vendors and other small recipients. This approach has the advantage of conforming this Department's enforcement role in regard to small recipients with the standard used under title VII of the Civil Rights Act of 1964. The Secretary solicits comment on the advisability of this approach.

Paragraph (h) defines Federal financial assistance so as to exclude contracts of insurance or guaranty. The exemption for such contracts, with respect to title VI and title IX, is contained in the respective statutes. It has been included in this proposed regulation for the sake of consistency in the administration of the Department's civil rights enforcement program and because of the Congressional directive, in the legislative history of the Rehabilitation Act Amendments of 1974, to implement section 504 in the same manner as title VI and title IX. Several comments pointed out, however, that the implications of, and justification for, this exemption may differ in the case of section 504. The Department therefore seeks further comment on this issue.

Paragraph (j) of § 84.3 defines the class of persons protected under the proposed regulation. The definition of handicapped person in paragraph (j)(1) conforms to the statutory definition of handicapped person that is applicable to section 504, as set forth in section 111 (a) of the Rehabilitation Act Amendment of 1974, Pub. L. 93–516.

The first of the three parts of the statutory and regulatory definition includes any person who has a physical or mental impairment that substantially limits one or more major life activities. The proposed regulation further defines physical or mental impairment and major life activities.

Physical or mental impairments are not, in general, defined by listing specific diseases and conditions because of the difficulty of ensuring the comprehensiveness of any such list. The term includes such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, diabetes, mental retardation, emotional illness, and, as discussed above, drug and alcohol addiction. It should be noted that, under this part of the definition, a physical or mental impairment does not constitute a handicap unless its severity is such that it results in a substantial limitation of one or more major life activities.

The Department intends to interpret this first of the three parts of the definition so as to ensure that only physical and mental handicaps are included. Thus, environmental, cultural, and economic disadvantages are not in themselves covered by this part of the definition, nor are prison records, age, or homosexuality. If, however, a person who has any of these characteristics also has a physical or mental handicap, the person is included within the definition of handicapped persons, whether the handicap is the

cause or the result of, or is unrelated to, such characteristics.

In paragraph (j)(2)(i), physical or mental impairment is defined to include, among other impairments, specific learning disabilities. The Department will interpret the term as it is used in section 602 of the Education of the Handicapped Act, Pub. L. 91-230, as amended by Pub. L. 94-142. Paragraph (15) of section 602 uses the term "specific learning disabilities" to describe such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia; it explicitly excludes learning problems that are primarily the result of environmental, cultural, or economic disadvantage. It should be noted that section 5(b) of Pub. L. 94-142 requires the Commissioner of Education to prescribe regulations concerning the definition of specific learning disabilities and, if he or she finds that changes in the statutory definition are necessary, to submit recommendations for legislation in that regard. The Office for Civil Rights will conform its interpretation of this term to that of the Office of Education and to any amended statutory definition under the Education of the Handicapped Act.

The second of the three parts of the statutory and regulatory definition of handicapped person includes any person who has a record of a physical or mental impairment that substantially limits major life activities. "Record" is further defined in the proposed regulation so as to include both history of, and inappropriate classification as having, a handicap. Thus, persons who have a history of a handicapping condition but no longer have the condition, as well as persons who have been incorrectly classified as having such a condition, are protected from discrimination under section 504. Frequently occurring examples of the first group are persons with histories of mental or emotional illness, heart disease, or cancer; of the second group, persons who have been misclassified as mentally retarded.

The third of the three parts of the statutory and regulatory definition of handicapped person includes any person who is regarded as having a physical or mental impairment which substantially limits one or more major life activities. Paragraph (j)(3) of the proposed regulation limits this part of the definition to three groups of people. The first two groups are described in (j)(3)(i) and (iii) and include, primarily, persons who are ordinarily considered to be handicapped but who do not technically fall within the first two parts of the statutory definition. Thus, a person whose physical or mental impairment has a less than substantial effect upon major life activities or has a substantial effect only upon minor life activities, such as a person with a limp, is considered handicapped for the purpose of section 504 if a recipient treats the impairment as constituting a handicap. The second group of persons who fall within this category, described at (j)(3)(ii), are those who have overcome their impairment to the point that any substantial limitation to major life activities is the result of the attitudes of other persons toward their impairment; this paragraph also includes some persons who might not ordinarily be considered handicapped, such as persons with disfiguring scars. Any limitations which such persons experience as a result of the impairment are not, in fact, caused by the disability but by the actions of other persons predicated on a view that the impairment constitutes a limitation.

Paragraph (j)(3)(iii) includes persons who have no physical or mental impairment but are treated by a recipient as if they were handicapped. If, for example, a nonhandicapped employee were to have a convulsion as a result of an atypical reaction to medication, any discriminatory employment practice based upon the conclusion that the person is epileptic would be prohibited by the proposed regulation.

Paragraph (k) of § 84.3 defines the term "qualified handicapped person." Throughout the proposed regulation, this term is used instead of the statutory term "otherwise qualified handicapped person." The Department believes that the omission of the word "otherwise" is necessary in order to comport with the intent of the statute because, read literally, "otherwise" qualified handicapped persons include persons who are qualified except for their handicap, rather than in spite of their handicap. Thus, a blind person might possess all of the qualifications for driving a bus except sight and could therefore be said to be an otherwise qualified handicapped person for the job of driving. In all other respects, the terms "qualified" and "otherwise qualified" are intended to be interchangeable.

With respect to preschool, elementary, and secondary educational services, a qualified handicapped person is defined, in paragraph (k)(3), in terms of age. As of the date of the passage of section 504 (September 26, 1973), a handicapped person is qualified for preschool, elementary, or secondary services if the person is of an age at which nonhandicapped persons are eligible for such services or at which State law mandates the provision of educational services to handicapped persons. This latter provision was added, for the reasons set forth below, in response to comment.

Several comments, in response to the question of whether eligibility for elementary and secondary education services should be based upon a standard of age or of substantial benefit, recommended the latter because of the need of many handicapped children for early or extended services if they are to have an equal opportunity to benefit from educational programs. Another comment noted the many States that have passed laws extending the age range, both below and above the normal range, during which handicapped children are to be provided educational services. It is believed that incorporating these State age ranges solves the problem of "substantial benefit" in a more administratively feasible manner than was proposed in the draft regulation attached to the Notice of Intent.

In addition, the extended age ranges for which recipients must provide full educational opportunity to all handicapped persons in order to be eligible for assistance under the Education of All Handicapped Children Act, Pub. L. 94-142, are incorporated by reference in paragraph (k)(3).

It should be noted that the definition of qualified handicapped person for purposes of private elementary and secondary schools is to be found not in paragraph (k)(3), but in paragraph (k)(4), which applies to all services except those enumerated in the preceding paragraphs.

The definition of qualified handicapped person in paragraph (k)(4) drew considerable comment from persons concerned that it could be read to allow the imposition of eligibility requirements that themselves violate section 504. The wording of the paragraph has been slightly amended so as to clarify its intent: requirements that have the effect of excluding persons on the basis of handicaps may be imposed only if they bear a substantial relationship to the purpose of the activity in question.

Section 84.4 contains general prohibitions against discrimination applicable to all recipients of assistance from this Department and to the programs and activities operated by such recipients. This section has been changed to reflect the views of commenters who objected to the draft regulation's emphasis on different treatment. Thus, "equal" and "as effective as" have been substituted for "comparable" in paragraphs (b)(i) and (b)(ii), respectively, and, in paragraph (b)(2), different or separate services are prohibited except when necessary to provide equally effective benefits.

In this context, the term "equally effective" is intended to encompass the concept of equivalent, as opposed to identical, services and to acknowledge the fact that in order to meet the individual needs of handicapped persons to the same extent that the corresponding needs of nonhandicapped persons are met, adjustments to regular programs or the provision of different programs may sometimes be necessary. For example, a welfare office that uses the telephone for communicating with its clients must provide alternative modes of communicating with its deaf clients. This standard parallels the one established under title VI of Civil Rights Act of 1964 with respect to the provision of educational services to students whose primary language is not English. See "Lau v. Nichols", 414 U.S. 563 (1974). The rewording of this provision is intended to emphasize that, although separate services may be required in some instances, the provision of unnecessarily separate or different services is discriminatory.

Section 84.4(b)(1)(iii) is adopted from the title IX regulation and prohibits a

recipient from assisting another entity or person that subjects participants or employees in the recipient's program to discrimination on the basis of handicap. This section might apply, for example, to financial support by a recipient to a community recreational group or to a recipient's sanctioning of a professional or a social organization. Among the criteria to be considered in each case are the substantiality of the relationship between the recipient and the other entity involved, including financial support by the recipient, and whether the other entity's activities relate so closely to the recipient's program or activity that they fairly should be considered activities of the recipient itself.

One comment was concerned with the omission in the regulation of a provision prohibiting the exclusion of handicapped persons from advisory or planning councils. Such exclusion is implicitly prohibited by the provisions of § 84.4.

Section 84.5, except for paragraphs (a) (2) and (3), is adopted from the title VI and title IX regulations. Paragraph (a) (1) requires a recipient found to have discriminated on the basis of handicap to take remedial action to overcome the effects of that discrimination. Paragraph (a) (2) extends the responsibility for taking remedial action to a recipient that exercises control over a noncomplying recipient. Paragraph (a) (3) also makes clear that handicapped persons who are not in the program at the time that remedial action is required to be taken may also be the subject of such remedial action; this paragraph has been revised in response to comments in order to clarify that it does not apply to discrimination that occurred before the effective date of the regulation.

In response to comment, paragraph (c) of § 84.5 has been revised to require the participation of handicapped persons in the self-evaluation process. Comment is invited on this provision, especially as to the existence of special circumstances in the health and welfare areas that would make some aspect of this self-evaluation process unduly burdensome.

Section 84.6 requires, as do both the title VI and IX regulations, a recipient to submit to the Director an assurance that each of its programs and activities receiving or benefiting from Federal financial assistance from this Department will be conducted in compliance with this regulation. Because such an assurance is, in effect, a contract between the Department and the recipient, it has the effect of giving aggrieved persons who are beneficiaries of federally assisted programs or activities the right to seek judicial enforcement of the regulation, under the third party beneficiary principle of contract law. See "Lemon v. Bossier Parish," 240 F. Supp. 790 (W.D.La. 1965), aff'd 370 F.2d 847 (5th Cir. 1967), cert. denied, 388 U.S. 911 (1967).

Paragraph (b) of § 84.8 requires certain recipients to adopt and publish grievance procedures. The many comments received with respect to this provision were concerned with the following points: (1) That grievance procedures be published in alternative modes of communication, (2) that complainants not be compelled to exhaust the internal grievance mechanism before presenting their complaints to this Department, (3) that a specific time limit be placed on the recipient's response to individual complaints, (4) that the regulation set forth uniform due process standards to which the grievance procedures must conform, and (5) that recipients not be required to establish separate procedures under title IX and section 504.

The wording of this section has been changed to ensure that grievance procedures be disseminated in an effective manner, so as to ensure that visually and hearing impaired persons will be notified. Because of the expressions of concern and a certain amount of misunderstanding evidenced by the comments in this regard, it is important to note that the grievance procedures required under this paragraph are not exclusive but allow a complainant to make use of the Department's complaint process without exhausting the remedy herein provided. No specific standards or time limits have been added in this proposal because of the desirability of consistency with the title IX regulation.

The provisions of § 84.9, which set forth requirements concerning dissemination of policy, are in general self-explanatory. In response to a number of comments, the section has been revised to require that information be provided in alternative modes of communication so as to constitute effective notification to persons with visual or hearing impairments.

The Department's interpretation of paragraph (b) (2) of § 84.9, which prohibits use or distribution of publications that indicate that the recipient engages in discriminatory practices in violation of section 504, may also be worth noting. That paragraph is identical to the corresponding provision of the title IX regulation and will be similarly interpreted. It will not, for example, be deemed by the Department to preclude the use in a college catalog of a picture of a campus building with stairs but no ramp. It will be interpreted to require that such a catalog provide countervailing evidence, such as a picture that includes a ramp or students in wheelchairs, that handicapped students attend the institution and are not treated in a discriminatory manner.

Subpart B: Issues From Notice of Intent

Subpart B prescribes requirements for nondiscrimination in the employment practices of recipients of Federal financial assistance administered by the Department. This subpart generally follows the employment provisions of the Department's regulation implementing title IX of the Education Amendments of 1972, which, in turn, generally follow the Sex Discrimination Guidelines (29 CFR Part 1604) of the Equal Employment Opportunity Commission (EEOC), implementing title VII of the Civil Rights Act of 1964, and the regulation of the Office of Federal Contract Compliance Programs (OFCCP), United States Department of Labor (41 CFR Part 60), implementing Executive Order 11246. It is also, insofar as is possible, consistent with the provisions of the final regulation issued by the Department of Labor on April 16, 1976 at 41 FR 16147 effectuating section 503 of the Rehabilitation Act of 1973, as amended, which requires certain Federal contractors to take affirmative action in the employment and advancement of qualified handicapped persons. Almost all recipients who are subject to this Part 84 are also subject to title VII or title IX and many are also subject to Executive Order 11246 and to section 503.

The May 17, 1976 Notice of Intent included several issues on the subject of employment. The first of these issues involved the concepts of qualified handicapped person, reasonable accommodation, and undue hardship as used in the employment context.

Section 84.12 provides that a recipient shall make reasonable accommodation to the known physical or mental limitations of a handicaped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program. Where a handicapped person is not qualified to perform a particular job or where reasonable accommodation will not suffice to neutralize the effects of a person's handicap or will cause undue hardship, failure to employ or advance the handicapped person will not be considered discrimination, since the failure is due to objective and necessary criteria rather than to the fact that the applicant is handicapped. A recipient may not deny an employment opportunity to a person on the ground that reasonable accommodation will be necessary to enable that person to perform adequately on the job.

Reasonable accommodation includes such actions as job restructuring to shift duties and activities in a manner that will enable the handicapped person to perform the duties essential to the job without having to perform other duties that could as easily be done by someone else without undue hardship to the employer. Part-time employment is also a means of achieving reasonable accommodation. Reasonable accommodation with respect to employment also includes actions to make facilities used by employees readily accessible to and usable by handicapped persons. Such action may take the form of architectural modifications such as the addition of elevators, or it may take the form of location or relocation of particular offices or jobs so that they are in areas of the employer's facilities that are already accessible to and usable by handicapped persons. If such modifications or relocations would cause undue hardship, they need not be made.

Paragraph (c) of this section sets forth the factors that the Office for Civil Rights will consider in determining whether an accommodation necessary to enable an applicant or employee to per-

form the duties of a job would impose an undue hardship. Each of these factors (the size and type of the recipient's program and the nature and cost of the accommodation) will be given weight in the determination and will be measured in relative terms. Thus, a small day-care center might not be required to expend more than a nominal sum, such as that necessary to equip a telephone for use by an otherwise qualified deaf applicant for a secretarial position, but a large school district might be required to make available a teacher's aide to a blind applicant for a teaching job. The Department solicits comment as to any additional or alternative factors which should be considered in the determination of the existence of undue hardship.

The requirements of this regulation concerning reasonable accommodation are believed by the Secretary to constitute an interpretation of the term "otherwise qualified" as used in section 504 itself. The concept of reasonable accommodation represents an attempt to draw the line between persons who, but for their inability to perform certain job related tasks in the normal manner because of their handicap, would be fully qualified to perform the job in question, and persons who, despite reasonable accommodation, are unable to perform a necessary element of the job in question. A similar obligation is imposed upon Federal contractors in the regulation implementing section 503 of the Rehabilitation Act of 1973, administered by the Department of Labor, as noted above. That Department reports that it has experienced no difficulty in administering the requirement of reasonable accommodation or the limitation of undue hardship.

Thirty-five comments were directed particularly to the reasonable accommodation and undue hardship issues. Most of the comments appeared to favor the general concepts, although many suggested inclusion of a more detailed explanation of how the two terms would interact on a practical basis. Commenters were particularly interested in how and by whom decisions of employability would be made. These decisions will be made, in the first instance, by employers but will be subject to the review of the Department. In this regard, it is important to note that, under § 84.3(k)(1), the burden is placed on employers to demonstrate that a particular handicap would prevent an applicant or employee from performing the essential functions of the job in question. Some commenters favored deleting the undue hardship language; this proposal has been rejected.

The second employment issue raised in the May 17 Notice of Intent was the extent to which other provisions of the section 503 regulation should be included in the section 504 regulation. As noted earlier, the requirements in Subpart B generally follow the provisions of the Labor Department's section 503 regulation as well as those of other regulations controlling employment discrimination. About eight comments were received on this issue, all favoring consistency with the Department of Labor regulation. The proposed regulation includes sections on preemployment inquiries and reasonable accommodation that are similar to the DOL provisions.

The last employment issue raised in the May 17 notice concerned employment tests and other selection and promotion criteria and fringe benefits. About eight comments on this issue were received. While most of those comments were couched in general terms, several suggested difficulties inherent in administration of a health benefits plan that covered handicapped persons. One comment pointed out the lack of "verifiable actuarial figures" to substantiate the fact that the provision of fringe benefits to handicapped employees results in increased costs. The same commenter also suggested inclusion in the section concerning employment testing of a reference to the availability of alternative performance measures to tests and other commonly used instruments. One such alternative measure might be a person's experience with a state vocational rehabilitation agency.

In addition to the issues raised in the notice, a number of comments were received on other questions pertaining to employment. Several commenters expressed views that the provisions in the draft went beyond the intent of section 504. On the other side, some commenters suggested that further detail and more stringent requirements than were contained in the draft be included.

The proposed regulation, as noted earlier, parallels the employment provisions of the regulations under title IX, title VII, and Executive Order 11246. A more specific description of the proposed regulation follows.

Subpart B: Discussion of Specific Sections

Section 84.12, the reasonable accommodation provision, has already been discussed. Section 84.13(a), which is almost identical to the parallel section of the title IX regulation and to the FPOC and OFCCP regulations, provides that no test or criterion for employment that has a disproportionate, adverse effect on the employment of handicapped persons or any class of handicapped persons may be used unless it has been validated as a predictor of performance in the position in question and alternative tests that do not have such a disproportionate effect are unavailable. This standard is based upon the principle established under title VII of the Civil Rights Act of 1964 in "Griggs v. Duke Power Company," 401 U.S. 424 (1971).

Section 84.13(b) requires that a recipient take into account that some tests and criteria depend upon sensory, manual, or speaking skills that may not themselves be necessary to the job in question but that may make the handicapped person unable to pass the test. The recipient must select and administer tests for any employment opportunity in such manner as is necessary to ensure that the test will measure the handicapped person's ability to perform on the job rather than that person's ability to see, hear, speak, or perform manual tasks, except, of course, where such skills are the factors that the test purports to measure. For example, a person with a speech impediment may be perfectly qualified for jobs that do not or need not, with reasonable accommodation, require ability to speak clearly. Yet, if given an oral test, the person will be unable to perform in a satisfactory manner. The test results will not, therefore, predict job performance but, instead, will reflect impaired speech.

Section 84.14 prohibits preemployment inquiry of an applicant as to whether the applicant is handicapped unless (1) the results are not used in connection with discrimination; (2) the inquiry is directed to determining whether the person has a handicap that would present a hazard to the person or to other employees on the particular job or would require accommodation; (3) the inquiry is accompanied by a statement assuring the nondiscriminatory use of its results; and (4) information concerning the medical condition or history of the applicant is obtained on a separate form which will be afforded confidentiality as a medical record. This provision is expected to be particularly helpful in eliminating discrimination against persons with nonvisible handicaps. The Department is aware that many persons with nonvisible handicaps advocate prohibition of any mandatory preemployment inquiry by employers concerning the presence of a handicap. This prohibition has not been incorporated into the proposed regulation, however, because the Department does not consider it to be within the mandate of the statute.

In response to comment, a new § 84.15 was added entitlement Recruitment. This section, which is modeled on a similar provision in the title IX regulation, prohibits discrimination on the basis of handicap in recruitment. It also provides that a recipient found to have violated the provision must specifically recruit handicapped persons of the type discriminated against so as to overcome the effects of the discrimination. For example, if a recipient is found to have been discriminating against deaf persons, and normal hearing is not essential to job performance, the recipient would be required to make specific attempts to recruit persons with impaired hearing. If, however, a recipient is also found to have discriminated against persons with various other types of handicaps, the corrective recruitment obligation would likewise extend to persons with those handicaps.

Section 84.16, formerly 84.15 in the draft regulation, prohibits employers from adopting or applying any policy or practice that results in discrimination on the basis of handicap in compensation for similar work on jobs whose performance requires similar skill and responsibility. Where, as a result of reasonable accommodation to a handicapped person's limitations, the person's duties are significantly different from those performed by others in the same job classification, dif-

ferent compensation may be provided, but the employer must be able to show that the difference in compensation is directly related to a significant difference in duties and responsibilities.

Finally, in response to comment, a new § 84.17 has been added entitled Job Classification and Structure. This provision is also patterned on the title IX regulation.

SUBPART C: ISSUES FROM NOTICE OF INTENT

In general, Subpart C prohibits the exclusion of qualified handicapped persons from federally assisted programs or activities by reason of the inaccessibility or unusability of a recipient's facilities. The May 17, 1976 notice sought public comment on whether section 504 prohibitions extend to architectural barriers and, if so, whether section 504 applies to existing as well as to new buildings. There was a substantial number of responses on this issue.

Most of the comments agreed that the protections of section 504 did, in fact, extend to the concept of architectural barriers and that the proposed regulation should apply to both new and existing buildings. The proposed regulation adopts the position that section 504 deals with the issue of the inaccessibility of buildings, whether new or existing, because the existence of architectural barriers operates to exclude handicapped persons from the federally assisted programs and services held within them.

SUBPART C: DISCUSSION OF SPECIFIC SECTIONS

A large number of comments were received on the cost of altering existing buildings to make them accessible. Recipients of funds from the Department, particularly institutions of higher education, sought various types of administrative relief concerning Subpart C, including a greater length of time to comply with the requirements of the proposed regulation, federal grants to aid recipients in the alteration of existing buildings, and the possibility of waiver of the requirements of the proposed regulation for certain recipients. On the other hand, handicapped persons and organizations representing handicapped persons noted that the statute itself allows no time periods or exceptions for recipients of Federal funds and therefore urged that the transition period for Subpart C be deleted and that cost not be considered in dealing with the issue of the physical accessibility of buildings.

Section 84.22 maintains the same standard for nondiscrimination in regard to existing facilities as was proposed in Appendix A in the May 17, 1976 notice. This section states that a recipient's program or activity, when viewed in its entirety, must be readily accessible to handicapped persons. Paragraph (a) makes clear that a recipient is not required to make each of its existing facilities accessible to, or usable by, handicapped persons if accessibility to the recipient's program or activity can be achieved by other means, such as by reassignment of classes to accessible buildings, by the assignment of aides to employees or beneficiaries, or by making alterations to only some of the recipient's existing facilities. Thus, for example, a university would not have to make all of its classroom buildings accessible to handicapped students. It would, however, have to undertake enough alterations, or, if some buildings were already accessible, reschedule enough classes so that it could offer all required courses and an adequate selection of elective courses in accessible buildings. For the university to exclude a handicapped student from a specifically requested course because it is not offered in an accessible building would constitute discrimination unless an equivalent course were made available.

Commenters representing several institutions of higher education have suggested that it would be appropriate for one postsecondary institution in a geographical area to be made accessible to handicapped persons and that other colleges and universities in that area participate in that school's program, thereby developing an educational consortium in a geographical area for the postsecondary education of handicapped students. While this approach would reduce the costs of eliminating architectural barriers and would foster the development of academic auxiliary aids and special curricula, it may be that such an approach would discriminate against qualified handicapped persons by restricting their choice in selecting institutions of higher education and therefore would be inconsistent with the basic objectives of the statute. The Secretary, however, would like to solicit public comment on this approach and other possible changes in the proposed regulation's approach to program accessibility that might reduce the burden on recipients of complying with this subpart.

There were several proposals concerning the length of the time period allowed by § 84.22(c) in the comments. One proposal suggested that the length of the time period should be dependent on the nature of the changes that a recipient is making. Thus, if a recipient makes alterations to its existing plant, constructs new buildings, or makes changes or modifications that result in substantial expenditures, it would be given four years within which to complete these changes. If, however, that recipient were making its program accessible by reassigning courses to existing buildings that are already accessible, by adding ramps to its buildings, by making other modifications that do not result in substantial financial cost, it would be given only one year within which to complete these changes. It is important to note that the existence of any time period does not mean that a recipient can postpone all action until the conclusion of the time period; the requirements of paragraph (d) of § 84.22 make it clear that action must be taken toward making the program accessible during each year of the time period.

Several commenters suggested that there should be no time period, while others suggested that recipients should be allowed to establish their own time periods. The Secretary believes that these approaches fail to recognize the balance between the needs of handicapped persons for access to postsecondary educational activities and the inherent difficulties in quickly making old buildings accessible. Comment, however, is specifically sought on these issues.

Finally, several commenters expressed concern that the program accessibility standard would result in the segregation of handicapped persons in educational institutions. The Secretary proposes to interpret the program accessibility standard and the general nondiscrimination requirement so that it would be a violation of section 504 either to segregate or concentrate persons with ambulatory impairments in classrooms, lecture halls, laboratories, or dormitories with handicapped persons who do not have ambulatory impairments or to isolate persons with ambulatory impairments from nonhandicapped students. Further, attention is drawn to the section of the proposed regulation that prohibits unnecessary separate treatment (§ 84.4(b)(2)), the section that requires mainstreaming of students in elementary and secondary schools (§ 84.35) and to the section that provides that appropriate housing be made available at the postsecondary level (section 84.45).

Alternative methods of complying with § 84.22 can also be used by providers of health and welfare services. Because there are many small providers in the health and welfare services areas, however, some approaches that they might use to achieve accessibility are of less general applicability and are therefore discussed further in the portion of the preamble concerned with these providers.

Under the provisions of § 84.23, a recipient is required to conform new design and construction, at a minimum, to the American National Standards Institute (ANSI) accessibility standards, as such standards are periodically and officially revised. Several comments noted that the ANSI standards are considered insufficient by many handicapped persons, but the Department believes that the fact that many states and Federal agencies have adopted the ANSI standards warrants their adoption in this regulation. An official revision of the standards is taking place at the present time and is expected to incorporate many of the recommendations of handicapped persons who are dissatisfied with the present standards.

Several commenters expressed concern that the use of the ANSI standards in the proposed regulation would undercut the existence of more stringent accessibility standards in several states, particularly Massachusetts. It is important to note that the provisions of this regulation establish minimum requirements for nondiscrimination. If a state or local government has accessibility standards that add other requirements and therefore extend beyond the ANSI standards, the state standards would not be in conflict with the proposed regulation.

Paragraph (b) of § 84.23 requires certain alterations to conform to the ANSI standards. If an alteration is undertaken to any portion of a building whose accessibility could be improved by the manner in which the alteration is carried out, then the alteration must be made in that manner. Thus, as minor an alteration as the installation of new carpeting is subject to the provisions of this section, since carpeting that enhances the ease of moving a wheelchair is available. Similarly, if a doorway or wall is being altered, the door or other wall opening must be made wide enough to accommodate wheelchairs. On the other hand, if the alteration consists of altering ceilings, the provisions of this section are not applicable because this alteration cannot be done in a way that affects the accessibility of that portion of the building.

Paragraph (d) of § 84.23 sets forth the manner in which the Department will coordinate its enforcement activities with the Architectural and Transportation Barriers Compliance Board in those situations in which a facility is subject to the requirements of this regulation and the requirements of section 502 of the Rehabilitation Act of 1973, as amended. The Architectural and Transportation Barriers Compliance Board has commented that, for buildings constructed with the assistance of Federal grants, this approach is not consistent with the overall statutory scheme of the Rehabilitation Act of 1973 and that such facilities are within the exclusive jurisdiction of the Board. The proposed regulation's position is based on the rationale that Federal construction funds, as a form of Federal financial assistance, confers jurisdiction under section 504, as well as under section 502.

Subpart D: Issues from Notice of Intent

Subpart D sets forth requirements for nondiscrimination in preschool, elementary, secondary, and adult education programs and activities, including secondary vocational education programs. The provisions of Subpart D, with the exception of § 84.33, apply to private education programs and activities as well as to public education programs and activities, and to State as well as to local educational agencies.

Two issues were raised in the Notice of Intent concerning Subpart D. The first of these is the degree to which the provisions of this subpart should conform to those of the Education of Handicapped Act, as amended by Pub. L. 94-142, and related Federal court cases. Although two commenters objected to any duplication of requirements, the remainder of the comments on this issue concurred with the position taken in the draft regulation that the principles enunciated in the court orders and embodied in Pub. L. 94-142 establish the minimum standards for nondiscriminatory elementary and secondary education programs and should therefore be specifically set forth in this regulation.

Therefore, §§ 84.33 through 84.36 continue to conform in general to the standards established for the education of handicapped persons in "Mills v. Board of Education of the District of Columbia," 348 F. Supp. 866 (D.D.C. 1972), "Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania," 334 F. Supp. 1257 (E.D. Pa. 1971), 343 F. Supp. 1257 (E.D. Pa. 1971), 343 F. Supp. 279 (E.D. Pa. 1972), and "Lebanks v. Spears," 60 F.R.D. 135 (E.D. La. 1973), as well as in the Education of the Handicapped Act, 20 U.S.C. 601 et seq.

The notice also asked whether cost or other difficulty in complying should affect a recipient's obligations under this subpart. Comments on this issue from recipients uniformly noted the financial burden that would ensue from the requirements of the regulations; many requested Federal assistance. Those from handicapped persons or their representatives uniformly objected to the Department's having raised the issue; many quoted the following excerpt from "Mills v. Board of Education," 348 F. Supp. 866 (D.D.C. 1972):

> If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom. 348 F. Supp. at 876.

The position of the Department with respect to this issue, stated more fully in the discussion of general issues above, is that neither cost nor other difficulty in complying are appropriate considerations in determining what practices constitute discrimination (except insofar as they are considered with respect to nonhandicapped persons), but that they may, in some instances, be relevant to determining an appropriate remedy.

Most of the comments concerning elementary and secondary education were directed to specific sections of the regulation. Much of the following discussion of these sections reflects the views presented in the comments.

Subpart D: Discussion of Specific Sections

Sections 84.34, 84.35, and 84.36 require, in general, that handicapped persons, regardless of the nature or severity of their handicap, be provided, in the most normal setting feasible, as suitable, adequate, and free an education as is provided to nonhandicapped persons. The requirements imposed in these sections are designed to ensure that no handicapped child is excluded from school on the basis of handicap and, if a recipient demonstrates that placement in a regular instructional setting cannot be achieved satisfactorily, that the student is provided with adequate alternative educational services suited to the student's needs without additional cost to the student's parents or guardian. For example, a recipient which operates a public school must either educate handicapped children in its regular program or provide such children with an appropriate alternative education at public expense, despite any resulting additional financial burden.

Section 84.34 sets forth the financial obligations of a recipient toward those handicapped persons who are legal residents of its jurisdiction. A child's legal residence is the residence of his or her parents or guardian. Thus, the substitution of the phrase "is a legal resident of" for the phrase "resides in" makes the recipient in whose jurisdiction a child's parents reside the fiscally responsible entity. This change is in response to the suggestion of several commenters that the proposed regulation make clearer the fiscal responsibilities of each concerned recipient. Programmatic responsibilities are discussed with reference to §§ 84.35 and 84.36.

Under this section, if the recipient does not itself provide handicapped persons with the requisite services, it must assume the cost of any alternative placement. If, however, a recipient offers adequate services and if alternative placement is chosen by a student's parent or guardian, then the recipient need not assume the cost of the outside services. If the parent or guardian believes that his or her child cannot be suitably educated in the recipient's program, he or she may, of course, make use of the procedural process incorporated in § 84.36(e).

It should be noted that this section extends the recipient's obligation beyond the provision of tuition payments: If a student is placed in a program which necessitates his or her being away from home, the payments must also cover room and board, transportation, and nonmedical care. Transportation must also be provided, through services or payments, if a nonresidential placement imposes transportation expenses upon a child's parents or guardian. One comment was received recommending that the regulation develop a reimbursement standard based on the financial means of the handicapped person's parents or guardian. This recommendation was rejected as being contrary to the intent of section 504. Another comment suggested that a recipient be responsible for costs of food only to the extent that such expenses exceed the cost of providing food for the child at home. The Department solicits comment as to the feasibility of adopting this standard in the final regulation.

The recipient's duty under sections 84.35 and 84.36 extends to each qualified handicapped person who resides in the recipient's jurisdiction. The phrase "resides in" is intended to encompass the concepts both of legal residence and actual presence in the recipient's jurisdiction. Thus, the recipient is responsible for ensuring that the requirements of these sections are met with respect to all students to whom it provides services, including those referred from other school districts, as well as to all students whom it refers to other public or private

schools, institutions, or agencies for services. It should be noted in this regard that referring a child to a noneducational agency does not absolve a recipient subject to this subpart of its responsibilities under these sections.

Section 84.35 provides that handicapped children shall be educated in the most normal setting feasible and may only be placed in special classes or separate schools when it is demonstrated by the recipient that education in the regular educational environment cannot be achieved satisfactorily. The wording of this section has been changed in response to the many comments that expressed a preference for the language of the corresponding provision in the Education of the Handicapped Act.

To meet the requirement of this section, a recipient must show that the needs of the individual handicapped person in question would, on balance, be furthered by placement outside the regular educational environment. It should be noted that, for many handicapped children, the most normal setting feasible is that which combines the use of special and regular classes.

Education in the most normal setting feasible is the education of handicapped persons, including those in public or private institutions or other care facilities, with persons who are not handicapped to the maximum extent appropriate. In addition, it is the education of handicapped children as close to home as is possible. Thus, as pointed out in several comments, the parents' right under § 84.36 (c) to challenge the placement of their child extends not only to placement in special classes or separate schools but also to placement in a distant school and, in particular, to residential placement. An equally appropriate educational program may exist closer to home; this issue may be raised by the parent or guardian under §§ 84.35 and 84.36(c).

The term "most normal setting feasible" is intended to encompass the same concept as the more commonly used "least restrictive alternative setting." It was chosen in preference to the latter term because placement alternatives cannot, in many instances, be compared on the basis of relative restrictiveness; i.e., while institutional education is indeed more restrictive than noninstitutional instruction, placement is special education classes is not necessarily more restrictive than instruction in regular classes. A number of comments objected to use of the word "feasible" as unnecessarily weakening the requirements of this section. It has been retained in the proposed regulation because it encompasses the concept of "capable of being achieved successfully" and thus takes into account the same considerations as does the revised language at the end of this section, adopted from Pub. L. 94-142.

It should also be noted that section 84.35 places a limit on the acceptable degree of flexibility allowed a recipient under Subpart C with respect to the physical accessibility of elementary and secondary school programs. The remedy set forth in Subpart C for discrimination resulting from the presence of architectural barriers does not require a school district to make every classroom and school building barrier-free; this provision may result in the placement of an orthopedically handicapped child away from his or her neighborhood school. However, under § 84.35, such a child may not be placed in a classroom or school that is primarily for handicapped children.

Section 84.36 concerns the provision of suitable educational services to handicapped persons and requires that such persons' individual educational needs be met to the same extent as are those of nonhandicapped persons. A suitable education could consist of education in regular classes, education in regular classes with the use of supplementary services, education in special instructional settings, separate education in private or public residential or nonresidential institutions or at home, or any combination thereof, so long as the placement is consistent with the requirements of § 84.35 and is the one best suited to the individual educational needs of the handicapped person in question. In addition, the quality of the educational services provided to handicapped students must be equal to those provided to nonhandicapped students; thus, handicapped students' teachers must be trained in the instruction of persons with the handicap in question and appropriate materials and equipment must be available. The Department is aware that the supply of adequately trained teachers may, at least at the outset of the imposition of this requirement, be insufficient to meet the demand of all recipients. This factor will be considered in determining the appropriateness of the remedy for noncompliance with this section.

Because the failure to provide handicapped persons with a suitable education is so frequently the result of misclassification or misplacement, paragraph (a) of § 85.36 makes compliance with its provisions contingent upon adherence to certain procedures designed to ensure appropriate classification and placement. These procedures are delineated in paragraphs (b) through (e) of § 84.36 and are concerned with testing and other evaluation methods and with procedural due process rights.

Paragraph (c) of § 84.36 establishes procedures designed to ensure that children are not misclassified or unnecessarily labeled as being handicapped because of inappropriate selection, administration, or interpretation of evaluation materials. This problem has been extensively documented in "Issues in the Classification of Children," a [illegible] by the Project on Classification of Exceptional Children, in which the HEW Interagency Task Force participated. The provisions of this paragraph are aimed primarily at abuses in the placement process that result from misuse of, or undue or misplaced reliance on, standardized scholastic aptitude tests. Subparagraph one requires recipients to provide and administer evaluation materials in the primary language of the student. Subparagraphs two through four are, in general, intended to prevent misinterpretation and similar misuse of test scores and, in particular, to avoid undue reliance on general intelligence tests. Subparagraph five requires a recipient to administer tests to a student with impaired sensory, manual, or speaking skills in whatever manner is necessary to avoid distortion of the test results by the impairment.

Subparagraphs six through eight require a recipient to draw upon a variety of sources in the evaluation process so that the possibility of error in classification is minimized. In particular, subparagraph seven requires that all significant factors relating to the learning process, including adaptive behavior, be considered. (Adaptive behavior is the effectiveness with which the individual meets the standards of personal independence and social responsibility expected of her or his age and cultural group.) In response to the concern expressed by several commenters that nontest data, even when collected, is commonly ignored, the proposed regulation includes a requirement that the weight given to each source be documented. In addition, subparagraph eight requires that a student not be placed outside the regular instructional setting if the information derived either from testing or from other sources results in a showing that the student does not need to be so placed.

Misclassification often constitutes discrimination on the basis of sex, race, or national origin as well as on the basis of handicap. In fulfillment of its responsibilities under title VI of the Civil Rights Act of 1964 and title IX of the Education Amendments of 1972, the Office for Civil Rights, in August 1975, issued a memorandum to all chief state school officers and local school district superintendents on this subject. The enforcement of section 504, title IX and title VI will be closely coordinated with respect to this problem.

Paragraph (e) of § 84.36 incorporates from the Education of the Handicapped Act, 20 U.S.C. 1415, as amended by Pub. L. 94-142, certain due process procedures which a recipient must afford to parents or guardians before taking any action regarding the identification, evaluation, or educational placement of a person who, because of handicap, needs or is believed to need special instruction or related services. The safeguards thereby incorporated include the rights to prior notice, to examine relevant records and to obtain an independent evaluation of the person, to present complaints, and to obtain an impartial due process hearing. A recipient must also establish procedures for the protection of handicapped students who are wards of the state or whose parents or guardian are unknown or unavailable. In response to comments, the wording of this paragraph has been changed to ensure that, consistent with the requirements of Pub. L. 94-142, these procedures are available to parents before evaluation of their child is initiated.

Section 84.37 requires a recipient to provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities. Because these services and activities are part of a recipient's education program, they must, in accordance with the provisions of § 84.35, be provided in the most normal setting feasible.

Paragraph (c)(2) does permit separation or differentiation with respect to the provision of physical education and athletics activities, but only if such action is necessary to further equal opportunity for participation by handicapped students. This paragraph of the proposed regulation has been changed in response to several comments noting that the draft regulation failed to make clear that the standard here is the same as the one for academic services. It is expected that little separation or differentiation will be necessary since most handicapped students are able to participate in one or more regular physical education and athletics activities. For example, a student in a wheelchair can participate in regular archery courses, as can a deaf student in wrestling. The preference of the handicapped student in question must be taken into consideration in determining whether separate classes are necessary in order to provide equal opportunity for participation.

Similar participation by handicapped students in the other services and activities enumerated in § 84.37 will, in most cases be feasible. Where, however, a student's handicap is such that participation in regularly offered activities and services is not possible, the recipient must provide comparable activities and services in which the student can participate. For that reason, a recipient is allowed one year from the effective date of the final regulation to comply with the requirements of the section. Comment is solicited as to the advisability of including this one-year period in the final regulation.

Section 84.38 requires that any facilities that are identifiable as being for handicapped students be comparable in quality to other facilities of the recipient. Despite a number of comments that urged the elimination of this section on the basis that it encourages the creation and maintenance of such facilities, it has been retained in the proposed regulation. This section is intended only to acknowledge that such facilities may, in rare instances, be necessary, as might be the case, for example, for severely retarded persons, and to emphasize that, if so, section 504 requires that they be as adequately staffed and maintained as are the facilities of the recipient that are not identifiable for handicapped persons.

Subpart E: Issues From Notice of Intent

Subpart E generally follows the Department's title IX regulation and prescribes requirements for nondiscrimination in recruitment and admission of students to postsecondary education programs and activities, including vocational education programs and activities, as well as for the nondiscriminatory treatment of students in such programs and activities. In addition to a general prohibition of discrimination on the basis of handicap in § 84.43(a), the regulation delineates, in § 34.42(b), specific prohibitions relating to the establishment or use of quotas, the use of tests or selection criteria, and preadmission inquiry.

In the May 17 Notice of Intent to Issue Proposed Rules, the Department raised four issues concerning higher education. The first issue was whether federally assisted colleges and universities should be required to adjust certain academic requirements because of the limitations of otherwise qualified handicapped students and applicants. Most of the comments on this issue were in agreement that the proposed regulation should not provide for a waiver of course requirements for handicapped persons because such a waiver would result in the lowering of academic standards, would give a distorted picture of the handicapped student to the general public, and would fail to prepare handicapped students for the real world. It was noted that course requirements are often established because of the existence of state and professional licensing requirements, state and Federal accreditation standards and various certification requirements and that waiver of such courses would, therefore, be impossible. Further comments asserted that federal involvement in postsecondary curricula not only contravenes the spirit of section 432 of the General Education Provisions Act but also is inadvisable Federal policy. Several comments suggested a preferred approach: Institutions of higher education should be required, not to waive, but to adapt specific courses of instruction to meet the individual needs of handicapped students. Under this approach an institution, in response to a specific situation, would develop an appropriate manner for a student to fulfill a required course, thereby meeting the student's needs and preserving the integrity of the course.

Paragraph (a) of § 84.44 in the proposed regulation requires that a recipient make certain adjustments to academic practices that discriminate or have the effect of discriminating on the basis of handicap. It specifically provides that academic requirements that have a discriminatory effect on handicapped students be modified in such a manner that the discrimination is remedied. This requirement, like its predecessor in Appendix A of the May 17 notice, does not obligate an institution to waive course or other academic requirements, but to accommodate them to the needs of specific handicapped students. For example, an institution could permit an otherwise qualified handicapped student who is deaf to substitute an art appreciation or music history course for a course in music appreciation or could modify the manner in which the music appreciation course is conducted for the deaf student. Where, however, such modifications or substitutions could be demonstrated by the recipient to violate interests that are essential to the recipient's program, they would not have to be made. It is important to note that under this approach, it is not the federal government, but the institution itself, through its faculty and staff, that determines the need for, as well as the type and extent of, the modification in question.

The second postsecondary education issue raised in the May 17 notice concerns the role of federally assisted colleges and universities in supplying auxiliary academic aids, such as taped texts, readers and interpreters, to handicapped students if such aids are not provided by the appropriate vocational rehabilitation agency. This issue generated a strong response from colleges and universities concerning the costs that would ensue from the provision of such services to handicapped students. These commenters asserted that the provision of auxiliary aids is not an appropriate education function for colleges and universities and that the financial burden for auxiliary aids should be borne by the student in conjunction with state vocational rehabilitation agencies, the Veterans Administration and private charitable organizations. Several commenters proposed that postsecondary educational institutions have a role in the provision of auxiliary aids but that the role be defined more narrowly than it was in paragraph (d) of § 84.44 of the May 17 draft. These commenters proposed that the recipient institutions should provide equipment that is permanent in nature and that could be used by groups of students, such as special library services and facilities for making equipment repairs, but that readers and interpreters should be considered as individualized or personal in nature and should not be provided by the institution. Several commenters suggested that recipient institutions should provide a centralized referral service that would refer students to existing financial sources for auxiliary aids as well as maintain lists of available and qualified readers, interpreters, and attendants.

Section 84.44(d) of the proposed regulation treats the issue of auxiliary aids and has been revised in response to the comments. Under paragraph (d) a recipient that provides a postsecondary educational program must take steps to ensure that no handicapped student is subjected to discrimination in the recipient's program because of the absence of necessary auxiliary educational aids for students with impaired sensory, manual or speaking skills. One manner by which a recipient could meet this obligation would be to develop a process to ensure that students are aware of and make use of such existing resources for auxiliary aids as state vocational rehabilitation agencies and private charitable organizations. Where no such existing resources supply auxiliary aids, the proposed regulation obligates the recipient to provide the

needed auxiliary aid. Auxiliary aids have been defined to include taped texts, interpreters for classrooms with deaf students, readers in libraries for students with visual impairments, or classroom equipment adapted for use by students with manual impairments, but not attendants, individually prescribed devices, readers for personal use or study, or other services of a personal nature.

The approach taken in § 84.44(d) should minimize the financial burden that many of the commenters feared would result from the requirement concerning auxiliary aids. It is the Department's understanding that the bulk of auxiliary aids will be paid for by state and private agencies, not by the colleges or universities. Where state and private agencies are so involved, the institution's responsibility will be only to facilitate the provision of these aids. In those circumstances where the recipient institution must provide the educational auxiliary aid, the flexibility which the proposed regulation affords should minimize the institution's curriculum. Other institutional impact. For example, some universities have utilized students who are earning degrees in fields related to handicapped persons to work with the institution's handicapped students as part of the institution's curriculum. Other institutions have used existing private institutions that, free of charge, tape existing texts for handicapped students to reduce the number of readers needed for visually impaired students. The Department believes there may be numerous creative approaches that can be used that are less costly for the institution but that guarantee that equal opportunity to participate in the recipient's educational program will be provided. Therefore, the Department welcomes suggestions on this subject.

The third issue raised concerning higher education sought public comment on the nature and extent of the responsibilities of federally assisted colleges and universities with respect to nonacademic and extracurricular activities and services, such as physical education, athletics, health services and physical therapy. While there was not a large number of responses on this issue, the commenters recognized that postsecondary institutions have an obligation to provide handicapped students with equal opportunities for participation in nonacademic and extracurricular services and activities. The comments stressed that the proposed rules should provide for flexibility in the approach taken in this area and generally agreed that the key concept should be the provision of comparable, and not necessarily identical, services. Several commenters noted that, in the area of intramural and intercollegiate athletics, there must be an identifiable and substantial interest as well as a significant number of handicapped persons if the requirements detailed in § 84.43(a) of the May 17 draft notice were to work properly.

The fourth issue concerning higher education raised the subject of cost and sought public comment on whether cost or difficulty in complying should affect the recipient's obligation to comply with section 504. This issue generated a great deal of comment, particularly from institutions of higher education, expressing concern with the cost of eliminating architectural barriers. Several commenters representing handicapped persons protested that seeking comment on the issue was inappropriate in that cost is not a factor that can be used to deny persons the basic human rights that section 504 guarantees. It is the Department's position on this issue that factors such as cost and difficulty in complying are not the appropriate focus of the determination of what constitutes discrimination, but that these factors can be considered in determining appropriate remedies.

Subpart E: Discussion of Specific Sections

Several comments focused on § 84.48(b) of the May 17 draft. This subsection provides that recipients which render academic, personal, or vocational counseling or guidance to students must do so in a nondiscriminatory manner, i.e., so that handicapped students are not counseled towards more restrictive career objectives or more restrictive available services than nonhandicapped students with similar interests and abilities. Several commenters noted that this provision might inhibit career counselors from informing handicapped persons of the difficulty or impossibility of pursuing certain professions because of the existence of certification or licensing requirements or because of obstacles concerning career preparation. The proposed regulation at § 84.48(b) has been modified to include this concept.

The standard established in § 84.42(b)(2) for admissions tests and other similar criteria parallels that used in the employment provisions of the regulations and is the same standard used in the May 17 draft. This provision prescribes overall success in the education program in question as the relevant criterion against which to validate any questionable selection device. Success in this context is to be measured in terms of students' entire scholastic record in the program in question and not just against first-year grades. The requirement that a test be validated as a predictor of success throughout the entire period of study in the program, rather than as a predictor of success in the first year of study, was based upon the fact that many handicapped persons, as a result of the discriminatory practices of recipients that operate elementary and secondary education programs, are not as thoroughly prepared for college as are nonhandicapped persons and therefore may take longer to demonstrate their capabilities in regard to college work. Because admissions test are commonly validated against first year grades, the Department was concerned that compliance with this requirement might be difficult. The comments received on this point, both from test users and test producers, considered this approach to be feasible.

Several comments addressed another aspect of test validation. They noted that, because of the small number of handicapped persons taking admissions tests, differential validation studies of tests for various subgroups of handicapped persons would be misleading, if not impossible. It is not the intent of this provision, however, to require differential validation with respect to subgroups of handicapped persons. If a test that has a disproportionate, adverse effect on handicapped persons can be validated with respect to the total population, this test would meet the requirements of § 84.42(b)(2). Because this issue is so important and because little comment was received on the Department's proposed approach, the Secretary is particularly seeking comment on the requirements of § 84.42(b).

Section 84.42(b) also requires a recipient to assure itself that admissions tests are selected and administered to applicants with impaired sensory, manual or speaking skills in such manner as is necessary to avoid unfair distortion of test results. Methods have been developed for testing the abilities and achievement of persons who lack the ability to take written tests or even to make the marks required for mechanically scored objective tests; in addition, methods for testing persons with visual or hearing impairments are available. A recipient, under this paragraph, must assure itself that such methods are used with respect to the selection and administration of any admissions tests that it uses.

Paragraph (c) of § 84.42 allows, in certain instances, the use of different admissions criteria with respect to handicapped persons. There was some adverse comment on this provision on the ground that it provides a basis for discriminatorily separate treatment. It is the intent of this paragraph to allow recipients whose regular admissions criteria do not adequately measure the academic potential of some handicapped persons to consider other factors in making admission decisions concerning such persons. Institutions are not given license to establish more rigorous standards for the admission of handicapped students by virtue of this paragraph; rather, they are permitted to expand the admissions process in ways that will positively affect the enrollment of such students. This provision thus parallels the approach taken by some institutions in their admissions procedures for minority students. The paragraph has been amended to clarify this intent and to limit its application to individual handicapped persons so as to remove its potential for allowing the establishment of separate programs.

Section 84.43 is the same as the corresponding section in the title IX regulation and contains general provisions prohibiting the discriminatory treatment of qualified handicapped students. Paragraph (b) of this section requires a recipient to develop and implement a procedure to ensure that the operator or sponsor of an education program or activity not operated wholly by the recipient, but in which the recipient requires

the participation of its students or employees, takes no action that the regulation would prohibit the recipient from taking. This requirement would apply, for example, to a college's responsibility to ensure that discrimination on the basis of handicap does not occur in connection with the teaching assignments of student teachers in schools not operated by the college. If the recipient finds that such discrimination is taking place and is unable to secure its prompt correction, it is required to terminate its connection with the operating or sponsoring entity.

Paragraph (c) of this section prohibits a recipient from excluding qualified handicapped students from any course, course of study, or other part of its education program or activity. This paragraph is designed to eliminate the practice of excluding qualified handicapped persons from specific courses and from areas of concentration because of factors such as ambulatory difficulties of the student or the assumption that no job would be available in the area in question for a person with that handicap.

Paragraph (a) of § 84.47 prohibits discrimination against qualified handicapped persons in the provision of financial assistance to students. It provides that recipients may not provide less assistance to or limit the eligibility of qualified handicapped persons for such assistance, whether the assistance is provided directly by the recipient or by another entity through the recipient's sponsorship. If, however, the recipient administers wills, trusts, or similar legal instruments that require awards to be made in a discriminatory manner, such awards are permissible, but only if the overall effect of the recipient's provision of financial assistance is not discriminatory on the basis of handicap.

The awarding of athletic scholarships is not prohibited by these provisions. Moreover, it will not be considered discriminatory to deny, on the basis of handicap, an athletic scholarship to a handicapped person if the handicap renders the person unqualified for the award. For example, a student who has cerebral palsy and is in a wheelchair could be denied a varsity football scholarship on the basis of handicap, but a deaf person could not, solely on the basis of handicap, be denied a scholarship for the school's diving team. The deaf person could, however, be denied a scholarship on the basis of comparative diving ability.

Paragraph (a) of § 84.48 establishes the same standards concerning nondiscrimination in the provision of physical education courses and athletic programs as does § 84.37(c) of Subpart D, discussed above, and will be interpreted in a similar fashion.

SUBPART F: ISSUES FROM NOTICE OF INTENT

Subpart F applies to health, welfare, and social service programs and to recipients which operate such programs. The Department received few comments on the health and social services issue concerning whether the proposed regulation should contain provisions on an institutionalized person's right to receive or refuse treatment and on payment of fair compensation for work done by patients. Several commenters suggested that the regulation should cover these areas and several others noted that the Department did not have authority to regulate in this area under section 504. The proposed regulation takes the same position as the draft regulation appended to the May 17 notice; i.e., there are no provisions concerning adequate and appropriate psychiatric care or safe and humane living conditions for persons institutionalized because of handicap or concerning payment of fair compensation to patients who perform work. The Secretary is of the opinion that to promulgate rules on these subjects is beyond the authority of section 504.

Most of the comments which were received concerning the provision of health, welfare, and social service programs responded to the second issue on health and social services, particularly to the definition of recipient in § 84.3(f) of Subpart A. The definition did not include providers of health services whose sole source of Federal financial assistance is Medicaid. This provision has been changed in response to the public comments which the Department received and is discussed above under Subpart A.

Several commenters noted that Subpart F of the proposed regulation lacked specificity and provided little guidance beyond a general prohibition against discrimination. One comment recommended that the proposed regulation should deal more specifically with problems of accessibility in the health and welfare area as well as with the problem of communicative barriers. Several provisions have been added to § 84.52 concerning health services and § 84.53 concerning welfare and other social services in response to these comments. Under §§ 84.52 and 84.53, recipients operating health, welfare, and social service programs are expressly prohibited from denying these services to qualified handicapped persons.

Specifically, §§ 84.52(a)(2) and 84.53 (b) clarify the responsibilities of recipients who provide health, welfare, and social service programs concerning accessibility. These sections and the requirements of Subpart C are interrelated and require that each recipient's program be operated so that no handicapped person is denied the benefits of federally assisted programs. The Secretary realizes that it may be impossible for every such recipient to make the facilities in which its services are offered physically accessible, just as it may be for some school districts to make every classroom or every building accessible. In these circumstances, it would be the recipient's responsibility to make arrangements for referrals for handicapped persons to accessible services in the same geographical area; it would be the concomitant responsibility of the state agency which distributes Federal funds to these recipients to ensure that handicapped persons are not effectively denied these federally assisted services because they are inaccessible in a particular geographical area. Thus, for example, for a state Medicaid agency to be in compliance, a single doctor whose only Federal connection is under the Medicaid program, might simply be required to make house calls or make arrangements for referrals, rather than to make architectural modifications to ensure accessibility to his or her office. The basic intention of the statute and the regulation, however, remains that no handicapped person should be denied the benefits of federally assisted programs, including health services reimbursed under Medicaid. Therefore, the state Medicaid agency must ensure that these services, when viewed in their entirety, are readily accessible. The same rationale would apply to a small daycare center that receives Federal funds under the welfare program and to the state agency that channels Federal funds supporting the day-care center.

In terms of "program" size and administrative structure, there is no equivalent to the local school district in the health services delivery system. The Medicaid program is administered through geographic areas much larger than the customary school district program area, and the phrase "readily accessible" implies clear limits on the distance a handicapped person should be required to travel in order to find a physically accessible service. In terms of distance traveled, the concept of "catchment area," as used in the National Health Planning and Resources Act of 1974, Pub. L. 93-641, may be the most reasonable approach to a "program" area within which comparable services could be made readily accessible to handicapped persons. If so, one method of compliance for local physicians and the state Medicaid program administrators would be to ensure that handicapped persons have ready access, within the health service area, to a range of Medicaid reimbursed services comparable to that available for the nonhandicapped.

For example, if there were three neurologists accepting Medicaid patients within the health service area, the state Medicaid agency must ensure that at least one of them is readily accessible to handicapped patients. Therefore, the responsibility for any Medicaid provider whose office is not accessible would be to refer handicapped patients to an accessible physician offering comparable services within the area. Alternatively, the provider could arrange to make his or her services accessible to handicapped patients by scheduling a few hours each week in an accessible setting, such as a local clinic or hospital, or by calling at the home of such patients. The responsibility for nondiscrimination rests then with the state Medicaid agency and also with each individual practitioner who accepts Medicaid reimbursement.

The Secretary seeks comments especially upon the enforcement approach proposed above with respect to providers which receive Federal assistance solely

under Medicaid. Additionally, it has been proposed that the Health Service Agency which receives Federal funds for comprehensive health planning for each health service area be required to include in its annual plan a description of the specific arrangements which ensure compliance with this regulation within its health service area. Comment is also sought on this proposal.

SUBPART F: DISCUSSION OF SPECIFIC SECTIONS

In further response to the comments, §§ 84.52(a)(3) and 84.53(c) have been added to the proposed regulation. These sections require that recipients that provide notice and information of the health, welfare, or other social services or benefits that they offer must do so in a manner that can be understood by handicapped persons with impaired sensory or speaking skills. For example, if a hospital has developed pamphlets concerning the community health services that it offers, it must make the same information available through such media as will reach persons with visual impairments.

The Department acknowledges that different types of recipients in the health, welfare, and social service areas provide a variety of notices concerning their services and that these notices may be issued to the general public, to segments of the general public or, as in the case of prepaid group practice organizations (HMOs), to their members. Accordingly, the Department solicits comment on the types of notices used and on the nature of the groups intended to be reached by these notices. Comments are also welcome concerning the possible burdens that would result from this requirement and concerning methods of reducing them.

The Department has also added at § 84.52(a)(5) a provision requiring state agencies which provide health services to medically underserved areas to ensure that qualified handicapped persons are not denied such services because of handicap.

Under § 84.54, a recipient that operates or supervises a residential or day-care program or activity for persons who are institutionalized because of handicap must ensure that any such persons who are qualified for educational services are provided with a suitable education in accordance with the reqirements of Subpart D.

While there were several comments on the lack of specificity in Subpart F, few of these comments offered concrete suggestions or additions. The Secretary, therefore, seeks comments or suggestions on how this Subpart can be made more specific.

INVITATION TO COMMENT

Persons who wish to submit comments concerning this regulation should write to the Director, Office for Civil Rights, Department of Health, Education, and Welfare, P.O. Box 1909, Washington, D.C. 20013. In order to insure full consideration, comments should be submitted on or before September 14, 1976. Comments received after that date will be considered, if feasible, before the regulation is prepared in final form.

Comments received in response to this notice will be available for public inspection in Room 5400, 330 Independence Avenue, SW., Washington, D.C. 20201, between 9:00 a.m. and 5:30 p.m., Monday through Friday, except on Federal holidays, until the regulation is published in final form. Copies of representative comments received by the Director will also be made available for public inspection in the office of each Regional Director of the Office for Civil Rights during normal business hours.

The Regional Directors and their offices are located as follows:

Region I, Mr. John G. Bynoe, RKO General Building, 5th Floor, Bulfinch Place, Boston, Massachusetts 02114.

Region II, Ms. Barbara Walker (Acting), 26 Federal Plaza, Rm. 3908, New York, New York 10007.

Region III, Mr. Dewey Dodds, Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19101.

Region IV, Mr. William Thomas, 50 Seventh Street, NE., Rm. 404, Atlanta, Georgia 30323.

Region V, Mr. Kenneth A. Mines, 309 W. Jackson Blvd., 10th Floor, Chicago, Illinois 60606.

Region VI, Ms. Dorothy D. Stuck, 1114 Commerce Street, Dallas, Texas 76202.

Region VII, Mr. Taylor D. August, 12 Grand Building, 12th and Grand Avenue, Kansas City, Missouri 64106.

Region VIII, Mr. David E. Florence, Federal Building, Rm. 11037, 1961 Stout Street, Denver, Colorado 80202.

Region IX, Mr. Floyd Pierce, 760 Market Street, Rm. 700, San Francisco, California 94102.

Region X, Ms. Marlaina Kiner, 6101 Arcade Plaza Bldg., 1321 Second Avenue, Seattle, Washington 98101.

This Part 84 is proposed under the authority of section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, and of section 111(a) of the Rehabilitation Act Amendments of 1974, 29 U.S.C. 706.

It is hereby certified that the economic and inflationary impacts of this proposed regulation have been carefully evaluated in accordance with OMB Circular A-107. Accordingly, the Department has available on request an inflationary impact statement which presents estimates of the regulation's economic costs and benefits.

In consideration of the foregoing, it is proposed to add Part 84 to Title 45 of the Code of Federal Regulations to read as set forth below.

Dated: July 13, 1976.

MARJORIE LYNCH,
Acting Secretary, Department of Health, Education, and Welfare.

PART 84—NONDISCRIMINATION ON THE BASIS OF HANDICAP IN FEDERALLY ASSISTED PROGRAMS

Subpart A—General Provisions

Sec.
84.1 Purpose.
84.2 Application.
84.3 Definitions.
84.4 Discrimination prohibited.
84.5 Remedial action, affirmative action, and self-evaluation.
84.6 Assurances required.
84.7 Duration of obligation and covenants.
84.8 Designation of responsible employee and adoption of grievance procedures.
84.9 Dissemination of policy.
84.10 Effect of State or local law or other requirements and effect of employment opportunities.

Subpart B—Employment Practices

84.11 Discrimination prohibited.
84.12 Reasonable accommodation.
84.13 Employment criteria.
84.14 Preemployment inquiries.
84.15 Recruitment.
84.16 Compensation.
84.17 Job classification and structure.
84.18 Fringe benefits.
84.19–84.20 [Reserved]

Subpart C—Program Accessibility

84.21 Discrimination prohibited.
84.22 Existing facilities.
84.23 New construction.
84.24–84.30 [Reserved]

Subpart D—Preschool, Elementary and Secondary Education

84.31 Application of this subpart.
84.32 Preschool and adult education programs.
84.33 Location and notification.
84.34 Free education.
84.35 Most normal setting feasible.
84.36 Suitable education.
84.37 Nonacademic services.
84.38 Comparable facilities.
84.39–84.40 [Reserved]

Subpart E—Postsecondary Education

84.41 Application of this subpart.
84.42 Admissions and recruitment.
84.43 Treatment of students; general.
84.44 Academic adjustments.
84.45 Housing.
84.46 Health and insurance.
84.47 Financial and employment assistance to students.
84.48 Other prohibited discrimination.
84.49–84.50 [Reserved]

Subpart F—Health, Welfare, and Social Services

84.51 Application of this subpart.
84.52 Health services.
84.53 Welfare and other social services.
84.54 Education of institutionalized persons.
84.55–84.60 [Reserved]

AUTHORITY: Sec. 504, Rehabilitation Act of 1973, Pub. L. 93-112, 87 Stat. 394 (29 U.S.C. 794); sec. 111(a), Rehabilitation Act Amendments of 1974, Pub. L. 93-516, 88 Stat. 1619 (29 U.S.C. 706).

Subpart A—General Provisions

§ 84.1 Purpose.

The purpose of this part is to effectuate section 504 of the Rehabilitation Act of 1973, which is designed to eliminate discrimination on the basis of handicap in any program or activity receiving Federal financial assistance.

§ 84.2 Application.

This part applies to each recipient of Federal financial assistance from the Department of Health, Education, and Welfare and to each program or activity that receives or benefits from such assistance.

§ 84.3 Definitions.

As used in this part, the term:

(a) "The Act" means the Rehabilitation Act of 1973, Pub. L. 93-112, as amended by the Rehabilitation Act Amendments of 1974, Pub. L. 93-516.

(b) "Section 504" means section 504 of the Act.

(c) "Department" means the Department of Health, Education, and Welfare.

(d) "Secretary" means the Secretary of Health, Education, and Welfare.

(e) "Director" means the Director of the Office for Civil Rights of the Department.

(f) "Recipient" means any State or political subdivision thereof, any instrumentality of a State or political subdivision thereof, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.

(g) "Applicant for assistance" means one who submits an application, request, or plan required to be approved by a Department official or by a recipient as a condition to becoming a recipient.

(h) "Federal financial assistance" means any grant, loan, contract, or any other arrangement, except contracts of insurance or guaranty, by which the Department provides or otherwise makes available assistance in the form of:

(1) Funds;

(2) Services of Federal personnel; or

(3) Property (both real and personal) or any interest therein or use thereof, including:

(i) Transfers or leases of such property for less than fair market value or for reduced consideration; and

(ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal government.

(i) "Facility" means all or any portion of buildings, structures, equipment, roads, walks, parking lots, or other real or personal property or interests therein.

(j) "Handicapped person." (1) "Handicapped person" means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

(2) As used in paragraph (j)(1) of this section, the term:

(i) "Physical or mental impairment" means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities; and (C) any medically recognizable disorder or condition that has not been definitely characterized as physical, rather than mental, or as mental, rather than physical, or that is characterized as both physical and mental.

(ii) "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(iii) "Record" means any documentation of a history of a mental or physical impairment which substantially limits one or more major life activities, whether or not that documentation is accurate or appropriate.

(3) As used in paragraph (j)(1) of this section, the phrase "is regarded as having an impairment" means (i) has a physical or mental impairment which does not substantially limit major life activities but which is treated by a recipient (or other person or entity acting for or in cooperation with the recipient) as constituting such a limitation, (ii) has a physical or mental impairment which substantially limits major life activities only as a result of the attitudes of others toward such impairment, or (iii) has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated by a recipient (or other person or entity acting for or in cooperation with the recipient) as having such an impairment.

(k) "Qualified handicapped person" means:

(1) With respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question;

(2) With respect to postsecondary and vocational education services, a handicapped person who meets the academic or technical standards requisite to admission or participation in the recipient's education program or activity;

(3) With respect to public preschool, elementary, secondary, or adult educational services, a handicapped person (i) of any age during which nonhandicapped persons are provided such services, (ii) of any age during which it is mandatory under State law to provide such services to handicapped persons, or (iii) to whom a State is required to provide a free appropriate public education under section 612 of the Education of the Handicapped Act, 20 U.S.C. 1412, as amended by section 5(a) of Pub. L. 94-142; and

(4) With respect to other services, a handicapped person who meets the essential eligibility requirements for the receipt of such services.

(l) "Handicap" means any condition or characteristic which renders a person a handicapped person as defined in paragraph (j) of this section.

(m) "Student" means a person who has gained admission to an education program or activity.

§ 84.4 Discrimination prohibited.

(a) *General.* No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives or benefits from Federal financial assistance, except as provided in §§ 84.22 and 84.37.

(b) *Discriminatory actions prohibited.* (1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual or other arrangements, on the basis of handicap:

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service or afford him or her an opportunity to do so which is not equal to that afforded others;

(ii) Provide a qualified handicapped person with an aid, benefit, or service which is not as effective as that provided to others;

(iii) Aid or perpetuate discrimination against a qualified handicapped person by providing assistance to any agency, organization, or person which discriminates on the basis of handicap in providing any aid, benefit, or service to beneficiaries of the recipient's program; or

(iv) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.

(2) A recipient may not provide different or separate aid, benefits or services to handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services which are as effective as those provided to others. For purposes of this paragraph, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result or to reach the same level of achievement, taking into account the nature of a particular person's handicap.

(3) In determining the types of aid, benefits, services, or facilities which will be provided, the class of persons to whom or the situation in which aid, benefits, services, or facilities will be provided, or the class of persons to be afforded an opportunity to participate in any program or activity, a recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration (i) which have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap, (ii) which have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to handicapped persons, or (iii) which perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same State.

(4) In determining the site or location of a facility, an applicant for assistance or a recipient may not make selections (i) which have the effect of excluding handicapped persons from, denying them the benefits of, or otherwise subjecting them to discrimination under any pro-

gram or activity which receives or benefits from Federal financial assistance or (ii) which have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the program or activity with respect to handicapped persons.

(5) As used in this section, the aid, benefit, or service provided under a program or activity receiving or benefiting from Federal financial assistance shall include any aid, benefit, or service provided in or through a facility which has been constructed, expanded, altered, or acquired, in whole or in part, with Federal financial assistance.

(c) *Programs limited by Federal law.* The exclusion of nonhandicapped persons from the benefits of a program limited by Federal law to handicapped persons or the exclusion of a specific class of handicapped persons from a program limited by Federal law to a different class of handicapped persons is not prohibited by this part.

§ 84.5 Remedial action, affirmative action, and self-evaluation.

(a) *Remedial action.* (1) If the Director finds that a recipient has discriminated against persons on the basis of handicap in violation of this part, the recipient shall take such remedial action as the Director deems necessary to overcome the effects of the discrimination.

(2) Where a recipient is found to have discriminated against persons on the basis of handicap in violation of this part and where another recipient exercises control over the recipient which has so discriminated, the Director, where appropriate, may require either or both recipients to take remedial action.

(3) The Director may, where necessary to overcome the effects of discrimination in violation of this part, require a recipient to take remedial action with respect to handicapped persons who are no longer participants in the recipient's program but who were participants in the program when such discrimination occurred.

(b) *Affirmative action.* In the absence of a finding of discrimination in violation of this part, a recipient may take steps, in addition to any action which is required by this part, to overcome the effects of conditions which resulted in limited participation in the recipient's program or activity by qualified handicapped persons.

(c) *Self-evaluation.* (1) A recipient shall, within one year of the effective date of this part:

(i) Evaluate, with the assistance of interested persons, including handicapped persons, its current policies and practices and the effects thereof, in terms of the requirements of this part;

(ii) Modify any of these policies and practices which do not or may not meet the requirements of this part; and

(iii) Take appropriate remedial steps to eliminate the effects of any discrimination which resulted or may have resulted from adherence to these policies and practices.

(2) For at least three years following completion of the evaluation required under paragraph (c)(1) of this section, recipients shall maintain on file and provide to the Director upon request a description of any modifications made pursuant to paragraph (c)(1)(ii) of this section and of any remedial steps taken pursuant to paragraph (c)(1)(iii) of this section.

§ 84.6 Assurances required.

An applicant for Federal financial assistance for a program or activity to which this part applies shall submit an assurance, on a form specified by the Director, that the program will be operated in compliance with this part. An applicant may incorporate these assurances by reference in subsequent applications to the Department.

§ 84.7 Duration of obligation and covenants.

(a) *Duration of obligation.* (1) In the case of Federal financial assistance extended to provide real property or structures thereon, the assurance shall obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used for the purpose for which Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits.

(2) In the case of Federal financial assistance extended to provide personal property, the assurance shall obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases the assurance shall obligate the recipient for the period during which Federal financial assistance is extended.

(b) *Covenants.* (1) Where Federal financial assistance is provided in the form of real property or interest therein from the Federal Government, the instrument effecting or recording this transfer shall contain a covenant running with the land to assure nondiscrimination for the period during which the real property is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar serivces or benefits.

(2) Where no transfer of property is involved but property is purchased or improved with Federal financial assistance, the recipient shall agree to include the covenant described in paragraph (b)(2) of this section in the instrument effecting or recording any subsequent transfer of the property.

(3) Where Federal financial assistance is provided in the form of real property or interest therein from the Federal Government, the covenant shall also include a condition coupled with a right to be reserved by the Department to revert title to the property in the event of a breach of the covenant. If a transferee of real property proposes to mortgage or otherwise encumber the real property as security for financial construction of new, or improvement of existing, facilities on the property for the purposes for which the property was transferred, the Director may, upon request of the transferee and if necessary to accomplish such financing and upon such conditions as he or she deems appropriate, agree to forbear the exercise of such right to revert title for so long as the lien of such mortgage or other encumbrance remains effective.

§ 84.8 Designation of responsible employee and adoption of grievance procedures.

(a) *Designation of responsible employee.* A recipient that employs fifteen or more persons shall designate at least one person to coordinate its efforts to comply with and carry out its responsibilities under this part.

(b) *Adoption of grievance procedures.* A recipient that employs fifteen or more persons shall adopt and publish in an effective manner, grievance procedures providing for prompt and equitable resolution of complaints alleging any action prohibited by this part.

§ 84.9 Dissemination of policy.

(a) *Notification of policy.* (1) A recipient that employs fifteen or more persons shall implement specific and continuing steps to notify all participants, beneficiaries, applicants, employees, other interested persons, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of handicap in the programs which it operates and that it is required by section 504 and this part not to discriminate in such manner. The notification shall contain such information and make use of such modes of communication as is necessary to apprise handicapped persons of the protections against discrimination assured them by section 504 and this part. It shall, where appropriate, state that the requirement not to discriminate in programs extends to admission or access thereto and to treatment and employment therein and shall also state that inquiries concerning the application of section 504 and this part to the recipient may be referred to a person designated by the recipient or by the Director.

(2) A recipient shall make the initial notification required by paragraph (a)(1) of this section within 90 days of the effective date of this part. Notification shall include publication in local newspapers and in newspapers and magazines operated by or on behalf of the recipient.

(b) *Publications.* (1) A recipient that employs fifteen or more persons shall include a statement of the policy described in paragraph (a) of this section in a prominent place in those publications containing general information which it makes available to a participant, beneficiary, applicant, employee, or other interested person.

(2) A recipient may not use or distribute a publication of the type described in paragraph (b)(1) of this section

which indicates, by text or illustration, that the recipient treats participants, beneficiaries, applicants, or employees in a manner prohibited by section 504 and this part.

§ 84.10 Effect of State or local law or other requirements and effect of employment opportunities.

(a) The obligation to comply with this part is not obviated or alleviated by the existence of any State or local law or other requirement which, on the basis of handicap, imposes prohibitions or limits upon the eligibility of qualified handicapped persons to receive services or to practice any occupation or profession.

(b) The obligaton to comply with this part is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for handicapped persons than for nonhandicapped persons.

Subpart B—Employment Practices

§ 84.11 Discrimination prohibited.

(a) *General.* (1) No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment, or in the recruitment, consideration or selection therefor, under any program or activity to which this part applies.

(2) A recipient shall make all decisions concerning employment under any program or activity to which this part applies in a manner which ensures that discrimination on the basis of handicap does not occur and may not segregate or classify applicants or employes in any way which could adversely affect an applicant's or employee's opportunities or statuts because of handicap.

(3). A recipient may not participate in a contractual or other relationship which has the effect of subjecting qualified handicapped applicants or employees to discrimination prohibited by this subpart. The relationship referred to in this subparagraph include relationships with employment and referral agencies, with labor unions, with organizations providing or administering fringe benefits to employees of the recipient, and with organizations providing training and apprenticeship prrograms.

(b) *Specific activities.* The provisions of this subpart apply to:

(1) Recruitment, advertising, and the processing of applications for employment;

(2) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation and changes in compensation;

(4) Job assignments, job classifications, organizational structure, position descriptions, lines of progression, and seniority lists;

(5) Departure and return from leaves of absence, sick leave, or any other leave;

(6) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(7) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training;

(8) Employer sponsored activities, including social or recreational programs; and

(9) Any other term, condition, or privilege of employment.

(c) A recipient shall comply with this subpart regardless of the terms of any collective bargaining agreement to which it is a party.

§ 84.12 Reasonable accommodation.

(a) A recipient shall make reasonable accommodation to the known physical or mental limitations of a handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

(b) Reasonable accommodation includes (1) making facilities used by employees readily accessible to and usable by handicapped persons and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, and other similar actions.

(c) In determining pursuant to paragraph (a) of this section whether an accommodation would impose an undue hardship on the operation of a recipient's program, factors to be considered include:

(1) The overall size of the recipient's program with respect to number of employees, number and type of facilities, and size of budget;

(2) The type of the recipient's operation, including the composition and structure of the recipient's workforce; and

(3) The nature and cost of the accommodation needed.

(d) A recipient may not deny any employment opportunity to a qualified handicapped employee or applicant or determine a handicapped employee or applicant to be unqualified if the basis for the denial or determination is the necessity for reasonable accommodation to the physical or mental limitations of the employee or applicant as required in this section.

§ 84.13 Employment criteria.

(a) A recipient may not make use of any test or criterion which has a disproportionate, adverse effect on the employment opportunities of handicapped persons or any class of handicapped persons unless (1) the test or criterion, as used by the recipient, has been validated as a predictor of performance for the position in question and (2) alternative tests or criteria for such purpose which have a less disproportionate, adverse effect are shown to be unavailable.

(b) A recipient shall select and administer tests concerning employment in such manner as is necessary to ensure that, when administered to an applicant or employee who has a handicap which impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's or employee's job skills, aptitude, or whatever other factor the test purports to measure, rather than reflecting the applicant's or employee's impaired sensory, manual, or speaking skills (except where such skills are the factors which the test purports to measure).

§ 84.14 Preemployment inquiries.

(a) A recipient may not make preemployment inquiry of an applicant as to whether the applicant is a handicapped person or as to the nature or severity of a handicap in a manner which results in discrimination prohibited by this subpart.

(b) Preemployment inquiries shall be limited to those necessary to determine whether the person has a handicap which would constitute a hazard to that person or to other employees or which would require accommodation under section 84.12.

(c) Preemployment inquiries shall be accompanied by a statement that the recipient is subject to this subpart and assuring that information obtained from the inquiries will not be used in a manner which would result in discrimination prohibited by this subpart.

(d) Information obtained in accordance with this section as to the medical condition or history of the applicant shall be collected only through use of separate forms which shall be accorded confidentiality as medical records. Supervisors may, however, be given information and instructions necessary to the person's health and safety and may be informed of work restrictions and necessary accommodations.

§ 84.15 Recruitment.

A recipient may not discriminate on the basis of handicap in the recruitment and hiring of employees. A recipient found to be in violation of this paragraph shall specifically recruit handicapped persons of the type discriminated against so as to overcome the effects of the discrimination.

§ 84.16 Compensation.

A recipient may not adopt or apply any policy or practice which, on the basis of handicap, result in the payment of wages or other compensation to handicapped employees at a rate less than that paid to nonhandicapped employees for similar work on jobs whose performance requires similar skill and responsibility.

§ 84.17 Job classification and structure.

A receipient may not:

(a) Classify a job as being for handicapped or nonhandicapped persons;

(b) Maintain or establish, on the basis of handicap, separate lines of progression, seniority lists, career ladders, or tenure systems based on handicap; or

(c) Maintain or establish, on the basis of handicap, lines of progression, seniority systems, career ladders, or tenure systems for similar jobs, position descriptions, or job requirements, unless it can

be shown that the particular handicap necessitates such differentiation.

§ 84.18 Fringe benefits.

(a) In making fringe benefits available to employees, a recipient may not:

(1) Administer, operate, offer, or participate in a fringe benefit plan which does not provide for equal benefits to handicapped and nonhandicapped persons and equal contributions to the plan by handicapped and nonhandicapped persons unless any difference in benefits or contributions is justified by verifiable actuarial figures and an actual, substantial increase in cost to the recipient; or

(2) Otherwise discriminate on the basis of handicap.

(b) Fringe benefits include any medical, hospital, disability, accident, life insurance, or retirement benefit, service, policy, or plan, any profit sharing or bonus plan, leave, or any similar employment benefit or service.

Subpart C—Program Accessibility

§ 84.21 Discrimination prohibited.

No qualified handicapped person shall, because a recipient's facilities are inaccessible to or unusable by handicapped persons, be denied the benefit of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity to which this part applies.

§ 84.22 Existing facilities.

(a) *Program accessibility.* A recipient shall, through the elimination of physical obstacles or through other methods, operate each program or activity to which this part applies so that the program or activity, when viewed in its entirety, is readily accessible to handicapped persons. This paragraph shall not necessarily be interpreted to require a recipient to make each of its existing facilities accessible to and usable by handicapped persons.

(b) *Methods.* In order to comply with paragraph (a) of this section, a recipient may employ such means as alteration of existing facilities, construction of new facilities, redesign of equipment, reassignment of classes to accessible buildings, assignment of aides to employees or beneficiaries, home visits by health and welfare agencies and providers, or any other methods which result in making its program or activity accessible to handicapped persons.

(c) *Time period.* A recipient shall achieve program accessibility as expeditiously as possible but in no event later than three years from the effective date of this part.

(d) *Transition plan.* A recipient which is not in compliance with paragraph (a) of this section on the effective date of this part shall develop, within six months of such date, a transition plan to achieve program accessibility. The transition plan shall, at a minimum:

(1) Identify physical obstacles in the recipient's facilities which limit the accessibility of its program or activity to handicapped persons;

(2) Establish priorities for achieving program accessibility on the basis of those activities which are most essential to beneficiaries of the recipient's program;

(3) Describe in detail the methods which will be used to make the recipient's program accessible;

(4) Specify the schedule for taking the steps necessary to achieve program accessibility and, if the time period of the transition plan is longer than one year, identify steps which will be taken during each year of the transition period in accordance with the priorities established under paragraph (d)(2) of this section;

(5) Indicate the person responsible for implementation of the plan; and

(6) Provide an opportunity for the involvement of interested persons, including handicapped persons, in the development of the transition plan.

(e) *Notice.* The recipient shall adopt and implement procedures to ensure that interested persons are informed (1) of the existence and location of accessible services and activities, (2) of facilities which are accessible to and usable by handicapped persons, and (3) of any transition plan developed pursuant to paragraph (d) of this section and the schedule established therein. The recipient shall make this information available in the form which allows effective notice to persons with impaired vision or hearing.

§ 84.23 New construction.

(a) *Design and construction.* Each facility or part of a facility designed or constructed by, on behalf of, or for the use of a recipient after the effective date of this part shall be designed or constructed in such manner that the facility or part of the facility is readily accessible to and usable by handicapped persons.

(b) *Alteration.* Each facility or part of a facility which is altered by, on behalf of, or for the use of a recipient after the effective date of this part in a manner which affects or could affect the usability of the facility or part of the facility shall be altered in such manner that the altered portion of the facility is readily accessible to and usable by handicapped persons.

(c) *American National Standards Institute accessibility standards.* To meet the requirement of paragraphs (a) and (b) of this section, a recipient shall, at a minimum, conform the design, construction, and alteration of its facilities to the "American National Standard Specifications for Making Buildings and Facilities Accessible to, and Usable by, the Physically Handicapped," published by the American National Standards Institute, Inc., as such standards are periodically and officially revised.

(d) *Architectural and Transportation Barriers Compliance Board.* If a facility of a recipient is subject to the requirements of this part and section 504 as well as to the requirements of section 502 of the Act and any applicable regulation promulgated by the Architectural and Transportation Barriers Compliance Board, the Department will, for a reasonable period of time not to exceed sixty days, defer action pending review by the Board.

Subpart D—Preschool, Elementary, and Secondary Education

§ 84.31 Application of this subpart.

Subpart D applies to preschool, elementary, secondary, and adult education programs and activities which receive or benefit from Federal financial assistance and to recipients which operate, or which receive or benefit from Federal financial assistance for the operation of, such programs or activities.

§ 84.32 Preschool and adult education programs.

(a) A recipient which operates a preschool education or day care program or activity or an adult education program or activity may not, on the basis of handicap, exclude qualified handicapped persons from the program or activity and shall take into account the needs of such persons in determining the aid, benefits, or services to be provided under the program of activity.

(b) A recipient which operates or sponsors a preschool compensatory education program or activity for children who are deemed disadvantaged because of cultural, economic, or linguistic conditions may not, on the basis of handicap, exclude qualified handicapped persons from its program or activity and shall take into account the needs of such persons in determining the aid, benefits, or services to be provided under the program or activity.

§ 84.33 Location and notification.

A recipient which operates a public education program shall:

(a) Annually undertake to identify and locate every qualified handicapped person residing in the recipient's jurisdiction who is not receiving a public education;

(b) Notify handicapped persons and their parents or guardians of the recipient's duty under this subpart; and

(c) Publicize generally such duty, in accordance with the provisions of § 84.9.

§ 84.34 Free education.

(a) A recipient to which this subpart applies shall provide a free education to each qualified handicapped person who is a legal resident of the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.

(b) For the purpose of this section, the provision of a free education is the provision of suitable educational and related services without cost to the handicapped person or to his or her parents or guardians, except for those fees which are imposed on nonhandicapped persons or their parents or guardians. It may consist either of the provision of free services or, if a recipient places a handicapped person in or refers such person to a program not operated by the recipient as its means of carrying out the requirements of this part, of grants in the amount of the cost of the services to the handicapped person or to his or her parents or guardians. If the program is resi-

dential, the provision of a free education also includes the provision of nonmedical care, room and board, and transportation.

§ 84.35 Most normal setting feasible.

A recipient shall provide educational and related services to each qualified handicapped person who resides in the recipient's jurisdiction in the most normal setting feasible and may not remove a handicapped person from, or place such person in a setting other than, the regular educational environment except when it is demonstrated by the recipient that the nature or severity of the person's handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

§ 84.36 Suitable education.

(a) A recipient to which this subpart applies shall provide as suitable an education to each qualified handicapped person who resides in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap, as the recipient provides to nonhandicapped persons. For this purpose, the provision of a suitable education is the provision of educational and related services and materials that adequately meet the individual educational needs of the person in question, as determined by the recipient using criteria consistent with this part. In order to be suitable, the education of persons who, because of handicap, need or are believed to need special education or related services must be based upon adherence to procedures which satisfy the requirements delineated in paragraphs (b), (c), (d), and (e) of this section.

(b) *Preplacement evaluation.* A recipient may not take any action regarding the educational placement, denial of placement, or transfer of placement of a person who, because of handicap, needs or is believed to need special education or related services without fully and individually evaluating such person's special educational needs.

(c) *Evaluation procedures.* A recipient shall establish standards and procedures for the evaluation and placement of persons who, because of handicap, need or are believed to need special education or related services which ensure, at a minimum, that:

(1) Tests and similar evaluation materials are provided and administered in the primary language of the student;

(2) Tests and similar evaluation materials have been properly and professionally validated for the specific purpose for which the recipient proposes to use them;

(3) Tests and similar evaluation materials are recommended by their producer for the specific purpose for which the recipient proposes to use them, are administered in conformance with the instructions provided by their producer, and are administered by trained personnel;

(4) Tests and similar evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient;

(5) Test selection and administration is such that, when a test is administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where such skills are the factors which the test purports to measure);

(6) No one test or type of test or other means of evaluation is used as the sole criterion for placement;

(7) Information from sources other than ability or achievement tests, including information concerning physical condition, sociocultural background, and adaptive behavior in home and school, is gathered and considered and the weight given to each of these sources is documented; and

(8) If the information derived either from ability and achievement tests or from other sources results in a showing that the student does not, because of handicap, need instruction in a special setting, the student will not be placed outside the regular instructional setting.

(d) *Reevaluation.* A recipient shall provide to each student who has been placed in a special instructional setting an annual reevaluation of his or her educational needs and progress in accordance with the procedures established in paragraph (c) of this section and shall inform the student's parents or guardian of the results of the evaluation. The effectiveness of the special education and related services provided to each student shall be examined and shall be a factor in determining whether a change in the student's placement is to occur.

(e) *Procedural safeguards.* A recipient shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, the procedural safeguards delineated in paragraphs (b) through (e), except subparagraph (e)(2) and the last sentence of subparagraph (e)(1), of section 615 of the Education of the Handicapped Act, 20 U.S.C. 1415, as amended by section 5(a) of Pub. L. 94-142.

§ 84.37 Nonacademic services.

(a) *General.* (1) A recipient to which this subpart applies shall provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities.

(2) Nonacademic and extracurricular services and activities include, but are not limited to, counseling services, physical education, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the recipient, referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the recipient and assistance in making available outside employment.

(3) A recipient shall comply with the provisions of this section as expeditiously as possible but in no event later than one year from the effective date of this part.

(b) *Counseling services.* A recipient to which this subpart applies which provides personal, academic, or vocational counseling, guidance, or placement services to its students shall provide these services without discrimination on the basis of handicap. The recipient shall ensure that handicapped students are not counseled toward more restrictive participation in available services or more restrictive career objectives than are nonhandicapped students with similar interests and abilities.

(c) *Physical education and athletics.* (1) In providing physical education courses and athletics and similar programs and activities to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient which offers physical education courses or which operates or sponsors interscholastic, club, or intramural athletics shall provide to handicapped students an equal opportunity for participation in these activities.

(2) Physical education and athletic activities offered to handicapped students may be separate or different from those offered to nonhandicapped students only if separation or differentiation is consistent with the requirements of section 84.35 and is demonstrated by the recipient to be necessary to provide handicapped students an equal opportunity for participation in these activities.

§ 84.38 Comparable facilities.

If a recipient, having clearly demonstrated the need for a separate facility, operates a facility which is identifiable as being for handicapped students, the facility and the educational services provided therein shall be comparable to the facilities and services of the recipient which are not so identifiable.

Subpart E—Postsecondary Education

§ 84.41 Application of this subpart.

Subpart E applies to postsecondary education programs and activities, including postsecondary vocational education programs and activities, which receive or benefit from Federal financial assistance and to recipients which operate, or which receive or benefit from Federal financial assistance for the operation of, such programs or activities.

§ 84.42 Admissions and recruitment.

(a) *General.* No qualified handicapped person shall, on the basis of handicap, be denied admission or be subjected to discrimination in admission or recruitment by a recipient to which this subpart applies.

(b) *Admissions.* In determining whether a handicapped person satisfies any policy or criterion for admission or in

making any offer of admission, a recipient to which this subpart applies:

(1) May not apply limitations upon the number or proportion of handicapped persons who may be admitted;

(2) May not make use of any test or criterion for admission which has a disproportionate, adverse effect on handicapped persons or any class of handicapped persons unless (i) the test or criterion, as used by the recipient, has been validated as a predictor of overall success in the education program or activity in question and (ii) alternative tests or criteria which have a less disproportionate, adverse effect are shown to be unavailable;

(3) Shall assure itself that the selection and administration of admissions tests in such that, when an admissions test is administered to an applicant who has a handicap which impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the applicant's impaired sensory, manual, or speaking skills (except where such skills are the factors which the test purports to measure); shall assure itself that admissions tests which are designed for persons with impaired sensory, manual, or speaking skills are offered as often and in as timely a manner as are other admissions tests; and shall assure itself that admissions tests that it administers are administered in facilities which are readily accessible to handicapped persons; and

(4) May make pre-admission inquiry as to whether an applicant for admission is a handicapped person in order to comply with this part but may not use the results of the inquiry in a manner which results in discrimination on the basis of handicap.

(c) *Different admissions criteria.* Where a recipient's criteria for admission do not adequately measure the qualifications of a particular handicapped applicant, a recipient may apply criteria for the admission of such applicant that differ from the criteria applied to nonhandicapped persons but only if application of such criteria (1) furthers equal educational opportunity for qualified handicapped persons, (2) does not constitute the giving of a preference on the basis of handicap, and (3) is useful as a predictor of completion of the education program or activity in question or of success in the occupation or profession for which the education program is designed to prepare students.

(d) *Recruitment.* (1) If a recipient to which this subpart applies recruits nonhandicapped applicants, it shall make comparable efforts to recruit handicapped applicants, except that the recipient may be required to undertake additional efforts to recruit handicapped applicants as remedial action pursuant to § 84.5(a) and may choose to undertake such efforts as affirmative action pursuant to § 84.5(b).

(2) A recipient shall include in its recruitment efforts schools which are primarily or exclusively for handicapped persons and shall make known to other schools from which it recruits applicants that it is subject to the provisions of this part.

§ 84.43 Treatment of students; general.

(a) No qualified handicapped student shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any academic, research, occupational training, housing, health, counseling financial aid, physical education, athletics, recreation, transportation, other extracurricular, or other postsecondary education program or activity which receives or benefits from Federal financial assistance.

(b) A recipient to which this subpart applies which requires participation by any applicant, student, or employee in any education program or activity not operated wholly by the recipient or which facilitates, permits, or considers such participation as part of, or equivalent to, an education program or activity operated by the recipient, including participation in educational consortia and cooperative employment and student teaching assignments, (1) shall develop and implement a procedure designed to assure itself that the operator or sponsor of the other education program or activity takes no action affecting any applicant, student, or employee of the recipient which this subpart would prohibit the recipient from taking; and (2) may not facilitate, require, permit, or consider such participation if such action occurs.

(c) A recipient to which this subpart applies may not, on the basis of handicap, exclude any qualified handicapped student from any course, course of study, or other part of its education program or activity.

§ 84.44 Academic adjustments.

(a) *Academic requirements.* A recipient to which this subpart applies shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student. Academic requirements which the recipient can demonstrate essential to the program of instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section. Modifications include changes in the length of time permitted for the completion of degree requirements substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.

(b) *Other rules.* A recipient to which this subpart applies may not impose upon handicapped students other rules, such as the prohibition of tape recorders in classrooms or of dog guides in campus buildings, that have the effect of limiting the participation of handicapped students in the recipient's education program or activity.

(c) *Course examinations.* In its course examinations or other procedures for evaluating students' academic achievement in its program, a recipient to which this subpart applies shall provide such methods for evaluating the achievement of students who have a handicap which impairs sensory, manual, or speaking skills as are necessary to ensure that the results of the evaluation represent the students achievement in the course, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where such skills are the factors which the test purports to measure).

(d) *Auxiliary aids.* (1) A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under the education program or activity operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills.

(2) Auxiliary aids include braille and taped texts, the availability of interpreters for classrooms for students with hearing impairments, the availability of readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, methods of making orally delivered materials available to students with hearing impairments, and other similar services and actions, but do not include attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature.

§ 84.45 Housing.

(a) *Housing provided by the recipient.* A recipient which provides housing to its nonhandicapped students shall provide comparable and accessible housing to handicapped students at the same cost as to others. At the end of the transition period provided for in Subpart C, such housing shall be available in sufficient quantity and variety so that the scope of handicapped students' choice of living accommodations is comparable to that of nonhandicapped students.

(b) *Other housing.* A recipient which assists any agency, organization, or person in making housing available to any of its students shall take such action as may be necessary to assure itself that such housing is, as a whole, made available in a manner which does not result in discrimination on the basis of handicap.

§ 84.46 Health and insurance.

(a) *Health services.* In providing a health, medical, or hospital aid, benefit, or service to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap and shall provide handicapped students with health and similar services which are comparable to those provided to other students.

(b) *Insurance benefits.* In providing a medical, hospital, accident, or life insurance benefit, service, policy, or plan to any of its students, a recipient may not discriminate on the basis of handicap or provide such insurance benefit, service, policy, or plan in manner which would violate Subpart B if it were provided to employees of the recipient.

§ 84.47 Financial and employment assistance to students.

(a) *Provision of financial assistance.* (1) In providing financial assistance to qualified handicapped persons, a recipient to which this subpart applies may not (i) on the basis of handicap, provide less assistance than is provided to nonhandicapped persons, limit eligibility for assistance, or otherwise discriminate; or (ii) through solicitation, listing, approval, or provision of facilities or other services, assist any foundation, trust, agency, organization, or person which provides assistance to any of the recipient's students in a manner which discriminates against qualified handicapped persons on the basis of handicap.

(2) A recipient may not administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established under wills, trusts, bequests, or similar legal instruments which require awards to be made on the basis of factors which discriminate or have the effect of discriminating on the basis of handicap unless the overall effect of the award of scholarships, fellowships, and other forms of financial assistance is not, on the basis of handicap, discriminatory.

(b) *Assistance in making available outside employment.* A recipient which assists any agency, organization, or person in making employment available to any of its students (1) shall assure itself that such employment is made available in a manner which would not violate Subpart B if it were provided by the recipient; and (2) may not render such assistance to any agency, organization, or person which discriminates on the basis of handicap in its employment practices.

(c) *Employment of students by recipients.* A recipient which employs any of its students may not do so in a manner which violates Subpart B.

§ 84.48 Other prohibited discrimination.

(a) *Physical education and athletics.* (1) In providing physical education courses and athletics and similar programs and activities to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient which offers physical education courses or which operates or sponsors intercollegiate, club, or intramural athletics shall provide to handicapped students equal opportunities for comparable participation in these activities.

(2) Physical education and athletic activities offered to handicapped students may be separate or different from those offered to nonhandicapped students only if the separation or differentiation is necessary to provide handicapped students an equal opportunity for participation in these activities.

(b) *Counseling and placement services.* A recipient to which this subpart applies which provides personal, academic, or vocational counseling, guidance, or placement services to its students shall provide these services without discrimination on the basis of handicap. The recipient shall, at a minimum, ensure that handicapped students are not counseled toward more restrictive participation in available services or more restrictive career objectives than are nonhandicapped students with similar interests and abilities. This requirement does not preclude a recipient from providing verifiable information about licensing and certification requirements that may present obstacles to handicapped persons in their pursuit of particular careers.

(c) *Social organizations.* A recipient which provides significant assistance to fraternities, sororities, or similar organizations shall assure itself that the membership practices of such organizations do not permit discrimination otherwise prohibited by this subpart.

Subpart F—Health, Welfare, and Social Services

§ 84.51 Application of this subpart.

Subpart F applies to health, welfare, and other social service programs and activities which receive or benefit from Federal financial assistance and to recipients which operate, or which receive or benefit from Federal financial assistance for the operation of, such programs or activities.

§ 84.52 Health services.

(a) *Availability of services.* (1) A recipient which provides health benefits or services may not, on the basis of handicap, deny these benefits or services to qualified handicapped persons.

(2) A recipient which provides health benefits or services shall ensure that these benefits or services are accessible to qualified handicapped persons through use of the methods set forth in Subpart C, including making house calls, referring patients, arranging to meet patients in accessible facilities, and modifying facilities.

(3) A recipient which provides notice concerning health benefits or services shall take such steps as are necessary to ensure that qualified handicapped persons with impaired sensory or speaking skills are not denied effective notice because of their handicap.

(4) A recipient which provides health benefits or services may not deny these benefits or services through discriminatory application of policies regarding deposits, extension of credit, or other financial matters.

(5) A recipient state agency which provides or arranges for the provision of health benefits or services for populations that are medically underserved shall ensure that handicapped persons are not effectively denied these benefits or services because of their handicap.

(b) *Level of services.* (1) All health services shall be provided to handicapped persons at least to the same extent that they are provided to nonhandicapped persons and shall be provided in such manner as is necessary to afford handicapped person equal opportunity to benefit from these services.

(2) A recipient shall develop and implement procedures to assure itself that handicapped persons are not subjected to discrimination by reason of the recipient's referrals of such persons to other entities or persons providing health benefits or services.

§ 84.53 Welfare and other social services.

(a) *General.* In providing welfare or other social services or benefits, a recipient may not, on the basis of handicap:

(1) Deny a qualified handicapped person these benefits or services;

(2) Provide benefits or services in a manner that limits or has the effect of limiting the participation of qualified handicapped persons; or

(3) Subject a handicapped person to different standards of eligibility for the benefits or services.

(b) *Accessibility of services.* A recipient which provides welfare or other social services or benefits shall ensure that these services or benefits are accessible to qualified handicapped persons as provided in Subpart C of this part.

(c) *Notice.* A recipient which provides notice concerning welfare or other social services or benefits shall take such steps as are necessary to ensure that qualified handicapped persons with impaired sensory or speaking skills are not denied effective notice because of their handicap.

§ 84.54 Education of institutionalized persons.

A recipient to which this subpart applies and which operates or supervises a residential or day care program or activity for persons who are institutionalized because of handicap shall ensure that each qualified handicapped person, as defined in § 84.3 (k)(2), in its program or activity is provided a suitable education, as defined in § 84.36.

[FR Doc.76-20528 Filed 7-15-76;8:45 am]